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In The

Supreme Court of the United States

October Term, 1996

CITY OF PHILADELPHIA; ELIZABETH REVEAL, AS DIRECTOR OF FINANCE FOR THE CITY OF PHILADELPHIA; CURTIS JONES, JR., AS DIRECTOR OF THE MINORITY BUSINESS ENTERPRISE COUNCIL FOR THE CITY OF PHILADELPHIA,

Petitioners,

vs.

CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, INC.; GENERAL BUILDING CONTRACTORS ASSOCIATION, INC.; ASSOCIATED MASTER PAINTERS & DECORATORS OF PHILADELPHIA, INC.; EMPLOYING BRICKLAYERS ASSOCIATION OF DELAWARE VALLEY, INC.; INTERIOR FINISH CONTRACTORS ASSOCIATION, INC.; MECHANICAL CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, INC.; ROOFING AND SHEET METAL CONTRACTORS ASSOCIATION, INC.; SUB-CONTRACTORS ASSOCIATION OF DELAWARE VALLEY, INC.; NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Court of Appeals ignore Respondents' choice of a facial challenge to the Ordinance and, as a result, employ an improper analysis to reach an invalid conclusion?

II. Did the ruling of a prior appeals court panel in *Contractors II* preclude a conflicting determination by the panel in *Contractors III* regarding the intent of the Ordinance and the admissibility and sufficiency of evidence of racial discrimination?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Petitioners City of Philadelphia, Elizabeth Reveal, as Director of Finance for the City of Philadelphia, Curtis Jones, Jr., as Director of the Minority Business Enterprise Council for the City of Philadelphia respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

Contractors Association of Eastern Pennsylvania, Inc. v. Philadelphia, 735 F. Supp. 1274 (E.D. Pa. 1990) (reproduced in the Appendix filed herewith at App. H at 213a).

Contractors Association of Eastern Pennsylvania, Inc. v. Philadelphia, 739 F. Supp. 227 (E.D. Pa. 1990) (reproduced in the Appendix filed herewith at App. G at 203a).

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Contractors Association of Eastern Pennsylvania v. City of

Philadelphia, 91 F.3d 586 (3d Cir. 1996) (reproduced in the Appendix filed herewith at App. B at 3a).

STATEMENT OF JURISDICTION

Petitioners seek review by this Court of the July 31, 1996 judgment of the United States Court of Appeals for the Third Circuit which affirmed the judgment of the United States District Court for the Eastern District of Pennsylvania dated July 11, 1995. On September 5, 1996, the United States Court of Appeals for the Third Circuit entered an Order denying Petitioners' Petition for Rehearing In Banc.

The statutory provision conferring jurisdiction on this Court to review by writ of certiorari the judgment and order in question is Title 28 United States Code § 1254(1) which in relevant part provides as follows:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) by writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree. . . .

28 U.S. § 1254(1) (App. I, 297a).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

Constitutional Provision

United States Constitution, Fourteenth Amendment (reproduced in the Appendix filed herewith at App. I, 300a-301a).

Statutes

Title 28 U.S.C. § 1254(1) (reproduced in the Appendix filed herewith at App. I, 297a).

Title 28 U.S. Code § 1331 (reproduced in the Appendix filed herewith at App. I, 298a).

Title 28 U.S. Code §§ 1343(a)(3)&(4) (reproduced in the Appendix filed herewith at App. I, 298a-299a).

Ordinance

Phila. Code, Chapter 17-500 (reproduced in the Appendix filed herewith at App. J, 302a).

Regulations to Chapter 17-500 of the Phila. Code (reproduced in the Appendix filed herewith at App. J, 360a).

STATEMENT OF THE CASE

The central issue of this appeal is the constitutionality of provisions of an Ordinance of the City of Philadelphia ("City"), to wit: Ordinance to assist Disadvantaged Business Enterprises, Phila. Code § 17-500 ("Ordinance") (App. J, 298a), which set participation goals for Black contractors in City construction contracts. Petitioners hereby petition for a writ of certiorari from the judgment of the United States Court of Appeals for the Third Circuit dated July 31, 1996, that affirmed the judgment of the United States District Court for the Eastern District of Pennsylvania dated January 11, 1995, declaring provisions of the Ordinance unconstitutional. *Contractors Association v. City of Philadelphia*, 893 F. Supp. 419 (E.D. Pa. 1995) (App. C, 57a); *Contractors Association of Eastern Pennsylvania v. City of Philadelphia*, 91 F.3d 586 (3d Cir. 1996) herein referred to as "*Contractors III.*" (App. B, 3a).

This litigation was initiated by the Respondents, as a facial challenge to the constitutionality of the Ordinance. Respondents claimed that the Ordinance violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Suit was filed against the City and against various City officials responsible for the administration and enforcement of the Ordinance.

United Minority Enterprise Associates, Inc. ("UMEA") intervened as a defendant and participated in the previous appeals and in the trial. Jurisdiction in the district court was pursuant to Title 28 U.S. Code §§ 1331, 1343(3) and 1343(4). (App. I, 298a-299a).

On two previous occasions Petitioners appealed from orders of the United States District Court for the Eastern District of Pennsylvania, that granted summary judgment to the Respondents, to the United States Court of Appeals for the Third Circuit. In each of those prior appeals, the Court of Appeals affirmed in part, reversed in part, vacated in part and remanded the matters back to the district court for action consistent with the appeals court opinions. The first appeal from the district court's order granting summary judgment resulted in a remand to allow UMEA an opportunity to engage in further discovery to develop evidence of a pattern of discrimination or instances of discrimination in the Philadelphia-area construction industry that occurred prior to passage of the Ordinance. *See Contractors Association of Eastern Pennsylvania, Inc. v. Phila.*, 735 F. Supp. 1274 (E.D. Pa. 1990) (App. H, 213a); *Contractors Association of Eastern Pennsylvania, Inc. v. Phila.*, 945 F.2d 1260, 1267-1268(3d Cir. 1991) (herein referred to as "*Contractors I*"). (App. F, 177a). In that appeal, Chief Judge A. Leon Higginbotham, Jr. wrote a concurring opinion in which he observed that an analysis of the Ordinance and the circumstances regarding its enactment demonstrated that it could be applied constitutionally

and therefore, it could not be successfully attacked by a facial challenge. *Id.* at 1268-1272. (App. F, 193a-202a).

In the second appeal the Court of Appeals (1) reversed the district court's grant of summary judgment in favor of Respondents with regard to the handicapped persons provisions of the Ordinance and remanded back to the district court for the entry of an order granting summary judgment for Petitioners; (2) vacated the district court's grant of summary judgment in favor of Respondents on the non-construction provisions of the Ordinance; (3) reversed the grant of summary judgment in favor of Respondents on the construction provisions of the Ordinance as applied to Black persons and (4) affirmed the grant of summary judgment in favor of Respondents on the provisions of the Ordinance which assisted Hispanics, Asian-Americans, Native Americans and women. *Contractors Association of Eastern Pennsylvania, Inc. v. Phila.*, Civ. No. 89-2737 W.L. 245851 (E.D. Pa. Sept. 22, 1992) (App. E, 171a); *Contractors Association of Eastern Pennsylvania v. Philadelphia*, 6 F.3d 990, 1011-1012 (3d Cir. 1993) (herein referred to as "*Contractors II*"). (App. D, 167a-170a). On the second appeal, the Court of Appeals agreed with the district court's interpretation that the definition of socially and economically disadvantaged persons applied, "only to minorities, women, and handicapped persons . . ." based on the record at the summary judgment phase of the litigation. *Id.* at 999-1000. (App. D, 140a).

On remand the district court was required to hold a trial on the construction provisions of the Ordinance as applied to Black persons. Prior to trial, Petitioners moved to preclude or limit the testimony of Respondents' proposed witness John Smith, the Executive Director of the Contractors Association, as not being relevant to a facial challenge to the Ordinance. The motion was denied. At trial Respondents relied on the testimony of two witnesses, John Smith and expert witness Dr. George R.

LaNoue, a professor of political science at the University of Maryland. The Petitioners presented the testimony of expert witness Dr. Andrew F. Brimmer, former Governor of the Federal Reserve Board and President of Brimmer & Company, Inc., and several fact witnesses.

At the conclusion of the trial the district court filed a Memorandum Order with Supporting Findings of Fact and Conclusions of Law, concluding that Petitioners failed to demonstrate that it had a compelling government interest in enacting 17-500's 15% goal for minority participation in City construction contracts. 893 F. Supp. at 436, 447. (App. C, 93a-94a, 121a-122a). The district court concluded that none of the evidence presented by Petitioners identified racial discrimination in the Philadelphia public or private construction industry that would authorize the use of race-based remedial relief. *Id.* at 436, 447. (App. C, 93a-94a, 121a-122a). In reaching that conclusion, the district court rejected Dr. Brimmer's statistical disparity and racial discrimination opinions as inadmissible expert testimony. *Id.* at 433, 436-437. (App. C, 87a, 95a-96a). The district court also characterized the opinions as insufficient as a matter of law to withstand "strict scrutiny." *Id.* at 427-431. (App. C, 72a-73a, 75a-81a).

The district court decided that Dr. Brimmer's opinions were sufficiently rebutted by: neutral explanations for the statistical disparities, *id.* at 428, 430-431 (App. C, 73a, 79a-81a); methodological or scientific flaws identified by Respondents' opposing expert George R. LaNoue, *id.* at 428-429, 431-433 (App. C, 73a-76a, 81a-87a), or by a showing of insignificant or inactionable disparities. *Id.* at 430-431, 433-437. (App. C, 79a-81a, 87a-94a, 96a-97a).

The district court found that the low level of Black participation in City-financed prime contracts in Fiscal Years

1979-81 was caused, not by racial discrimination, but by low availability of qualified Black Minority Business Enterprises ("MBE") in the Philadelphia Standard Metropolitan Statistical Area ("SMSA") and by their "sizeable" participation in federally-assisted public works projects at that time. *Id.* at 431, 437-438 (App. C, 81a, 91a). The district court enjoined Petitioners from "enforcing Chapter 17-500's racial preference, and the regulations promulgated thereunder, in the award of City construction contracts." *Id.* at 447. (App. C, 122a). The Petitioners thereafter appealed the district court's order to the Court of Appeals for the Third Circuit.

On the third appeal, the Court of Appeals affirmed the judgment of the district court that the provisions of the Ordinance, as applied to Black persons in the construction industry, were unconstitutional in violation of the Fourteenth Amendment to the United States Constitution. Petitioners' Petition for Rehearing In Banc was denied on September 5, 1996. (App. A, 1a-2a).

REASONS FOR GRANTING THE WRIT

In this case and in many other cases the substantive rights of parties may be determined by the form of the challenge that is made to the constitutionality of a state or federal statute. The Petitioners relied on almost ten years of district court and appellate court decisions which recognized this Court's decisions in *United States v. Salerno,* 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987) and *Hoffman Estates v. Flipside,* 455 U.S. 489, 494 n. 5, 102 S. Ct. 1186, 1191 n. 5 (1982), for the rule " . . . that a statute may only be invalidated on its face if it is incapable of any valid application" as the rule that governed facial challenges to the constitutionality of statutes.

In this case the district court and the Court of Appeals

disregarded the distinction between facial and as applied challenges to reach a result that was not possible under the generally accepted "*Salerno* Rule." The memorandum decision in *Janklow, Petitioner v. Planned Parenthood,* ___U.S. ___, 116 S. Ct. 1582 (1996), which asserts that the *Salerno* rule never existed, is tantamount to a major change in the law without prior notice to persons whose rights are affected by the change. This change is particularly disruptive where, as in this case, the change affects fundamental rights provided in the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

If the "*Salerno* rule" never existed then the misapprehension has been widespread and it includes judges, justices and others at all levels of legal jurisprudence. Petitioners were deceived into defending the City of Philadelphia's Affirmative Action program on the basis of the Respondents' facial challenge to the Ordinance creating the program. Chief Judge A. Leon Higginbotham, Jr., whose legal scholarship is attested in scores of law review articles, opinions and books which focus on issues of constitutional interpretation, cited the "*Salerno* rule" with approval in this case.

A clear statement of the distinction between a facial and an as applied challenge to the constitutionality of statutes or whether such a distinction exist, is desperately needed. In this case, if Petitioners had notice that the "*Salerno* rule" did not exist, their defense of the affirmative action program would have been very different.

I.

THE COURT OF APPEALS IGNORED RESPONDENTS' CHOICE OF A FACIAL CHALLENGE TO THE ORDINANCE AND AS A RESULT EMPLOYED AN IMPROPER ANALYSIS TO REACH AN INVALID CONCLUSION.

This action was commenced in the district court by Respondents' Complaint which made a facial challenge to Ordinance 17-500 enacted by the Philadelphia City Council. The Petitioners' first appeal to the Court of Appeals for the Third Circuit from a grant of summary judgment (*Contractors I*) resulted in a remand.

In *Contractors I*, Chief Judge A. Leon Higgenbotham, Jr.[1] wrote a concurring Opinion in which he reviewed the standards for analyzing a facial challenge to the Ordinance. He cited the Third Circuit opinion in *Hohe v. Casey*, 868 F.2d 69, 71, n. 2 (3d Cir.), *cert. denied*, 493 U.S. 848, 110 S. Ct. 144 (1989), for the proposition that ". . . the courts will not invalidate a statute on its face simply because it may be applied unconstitutionally, but only if it cannot be applied consistently with the Constitution." 945 F.2d at 1269 (App F, 196a). Judge Higgenbotham also cited *United States v. Salerno*, 481 U.S. at 745, 107 S. Ct. at 2100, and *Hoffman Estates v. Flipside*, 455 U.S. at 494 n. 5, 102 S. Ct. at 1191 n. 5, for the rule ". . . that a statute may only be invalidated on its face if it is incapable of any valid application." 945 F.2d 1272 (App F, 202a).

On remand the district court again granted summary judgment to Respondents and on appeal the appeals court panel did not address the issue raised by Petitioners, nor Judge

1. Chief Judge Higgenbotham is now retired.

Higginbotham's concurring opinion in *Contractors I,* regarding Respondents' choice to make a facial challenge to the Ordinance. *Contractors II* cited *supra.*

This Petition seeks review of a third appeal to the Court of Appeals and the refusal of the lower court to require Respondents to comply with the law regarding facial challenges to statutes. If the appeals court had not ignored the issue raised by Petitioners regarding Respondents' choice to make a facial challenge to the Ordinance, that court necessarily would have concluded that there were many circumstances where the Ordinance was constitutional on its face.

In *Contractors III,* the lower court concluded:

> Whether this record provides a strong basis in evidence for an inference of discrimination in the prime contract market *is a close call.*

(Emphasis added). 91 F.3d at 605. (App. B, 45a).

Then the lower court declined to make that close call. If after a trial there remained a "close call" as to an essential element to the constitutionality of the Ordinance then the facial challenge must fail whether it is analyzed by the rule in *Salerno* that there is "no circumstance" under which the Ordinance would be valid, or if it is analyzed by the recent Memorandum Decision in *Janklow, Petitioner v. Planned Parenthood, supra,* based on the invalidity of a statute in a "large fraction" of cases.

The suggestion in the *Janklow* Memorandum Decision that the *Salerno* "no circumstances" rule never existed contradicts many analyses and decisions in the federal courts since the *Salerno* decision in 1987. It also leaves unclear what, if any, distinction exists between a facial challenge and an as applied

challenge to a statute. *Janklow* Dissent, 116 S. Ct. at 1584. If this Court holds that a distinction does exist, then the reputed *Salerno* rule, that requires a facial challenge of a statute to demonstrate there is no circumstance when the statute can be enforced consistently with the Constitution, is consistent with the challenger's *choice* to proceed with a facial challenge. The *Salerno* rule requires a plaintiff to consider every possible application of a statute before deciding to make a facial challenge. Without the *Salerno* rule, facial challenges can be based on philosophical or other abstract disagreements with a statute. The right to challenge the constitutionality of a statute prior to its implementation should give the benefit of every doubt to the constitutionality of the statute. *Planned Parenthood Assoc. of Kansas City, Missouri, Inc. v. Ashcroft,* 462 U.S. 476, 493, 103 S. Ct. 2517, 2526 (1983); *Ohio v. Akron Center for Productive Health, et al.,* 497 U.S. 502, 514, 110 S. Ct. 2972, 2980 (1990).

The Opinion of the appeals court in *Contractors III* reveals that the lower court applied the wrong analysis in its consideration of the appeal. In spite of the fact that the Respondents made a facial challenge to the constitutionality of the Ordinance, the Court of Appeals, analyzed the Ordinance and record below from an "as applied" perspective.

The essential holding of the Court of Appeals is set forth on page 605 of the Opinion in *Contractors III*:

> Even assuming that the record presents an adequately firm basis for [the inference of discrimination by the City against minority prime contractors] the judgment of the district court must be affirmed because Chapter 17-500 is clearly not narrowly tailored to remedy that discrimination.

Id. at 605. (App. B, 42a).

Relying upon the assumption that there is a strong basis in the record to establish past discrimination by the City against Black prime construction contractors, the lower court went beyond the face of the Ordinance and examined its application to support the conclusion that the Ordinance was not narrowly tailored as to Black prime contractors. The lower court violated the established rule that "where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality." *See Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*, 462 U.S. at 493, 103 S. Ct. at 2526; *Ohio v. Akron Center for Productive Health, et al.*, 497 U.S. at 514, 110 S. Ct. at 2980. The lower court began its analysis by determining that the "sheltered market" aspects of the Ordinance, which the lower court concluded focused directly upon the inclusion of Black prime contractors, was "sparsely invoked by the City." 91 F.3d at 605. (App. B, 44a). The Court of Appeals examined the fact that most Black contractors who participated in City contracts by virtue of the Ordinance did so as subcontractors to non-minority contractors, again analyzing the application of the statute. *Id.* at 592, 606. (App. B, 12a, 44a). The lower court then held that:

> a program, like Philadelphia's current one, which focuses almost exclusively on the subcontracting market, is not narrowly tailored to address discrimination by the City in the market for prime contracts.

Id. at 606. (App. B, 45a).

There was nothing upon the face of the Ordinance, or any amendments thereto, to indicate that the "focus" of the Ordinance was limited to the subcontracting market. The Ordinance provided for minimum participation goals by MBEs on City construction contracts. That participation, on the face

of the Ordinance, was in the form of prime contracting, joint venturing or subcontracting. Indeed, upon review of the Ordinance, the Court of Appeals found that "dollars received by DBE [Disadvantaged Business Enterprise] *subcontractors* in connection with City financed prime contracts are counted toward the goals as well as dollars received by DBE *prime* contractors." *Id.* at 592. (App. B, 8a).

The Court of Appeals sanctioned the errors of the district court which employed an "as applied" analysis in its consideration of the fifteen percent participation goal in the Ordinance. The lower court approved the district court's conclusion that since the "fifteen percent preference of MBEs" was shared by an "amalgam of minorities" as opposed to just Black contractors, the Ordinance was not narrowly tailored. *Id.* at 607. (App. B, 44a). The most critical error of the lower court in utilizing an "as applied" analysis came in the examination of the exemption and waiver provisions of the Ordinance. During its review of the face of the Ordinance, the lower court recognized that the Minority Business Enterprise Council or any City agency can recommend exempting individual contracts or groups of contracts from chapter 17-500's requirements when there are insufficient DBEs in the SMSA to insure adequate competition and reasonable prices for contracts, §§ 17-505 (1) and (2). (App. J, 333a-334a, 350a-351a). Further, the lower court recognized that the Ordinance provided waiver provisions for non-minority prime contractors who certified that they made a good faith effort to utilized DBEs but were unable to meet the goals for the contract. *Id.* at 592. (App. B, 10a-11a).Yet, in spite of these provisions of the Ordinance, in determining that the Ordinance was unconstitutional, the Court of Appeals again supported the district court's "as applied" analysis in the examination of the waiver provisions of the Ordinance. On page 608 of the Opinion, the lower court states:

> As the district court found, "very few contractors have ever received waivers of Chapter 17-500's set aside requirements and even fewer city contracts have been exempted from the set aside program." 893 F.Supp. at 444. Indeed, the waivers and exemptions granted from July 1, 1987 to June 30, 1990, constituted less than 2% of the City's public work contracts.

Id. at 608. (App. B, 48a-49a).

If construction contracts were exempted from the Ordinance or if the requirements of the Ordinance were waived in any instance, as was evidently found by the district court and the Court of Appeals, then the Ordinance must survive a facial challenge to its constitutionality. *United States v. Salerno,* 481 U.S. at 745, 107 S. Ct. at 2100; *Hoffman Estates v. Flipside,* 455 U.S. at 494 n. 5, 102 S. Ct. at 1191 n. 5; *Hohe v. Casey,* 868 F.2d at 71, n. 2; *Robinson v. New Jersey,* 806 F.2d 442, 446 (3d Cir. 1986).

It is clear that the basis of lower court's decision in *Contractors III,* that the statute is not narrowly tailored, was reached by utilizing an "as applied" analysis as opposed to a facial analysis in the consideration of the record below. In addition, the lower court erroneously sanctioned the "as applied" approach of the district court. 91 F.2d at 607-608. (App. B, 48a-49a).

Several arguments made by Petitioners on appeal rested firmly upon the fact that the Respondents brought a facial, and not an as applied, challenge to the Ordinance: (1) that the Ordinance is constitutional on its face; (2) that the Respondents failed to meet their burden of proving that the Ordinance was

unconstitutional on its face; (3) that the Respondents failed to establish the standing necessary for a facial challenge to the constitutionality of the Ordinance; (4) that the Petitioners' Motion in Limine to preclude the testimony of John Smith on the application and implementation of the Ordinance to contracts should have been granted as that testimony was immaterial to a facial challenge to the constitutionality of the Ordinance. The lower court's affirmation of the district court's opinion that the Ordinance was not narrowly tailored and its summary dismissal of several of Petitioner's claims (*see* 91 F.3d at 610, n. 27) (App. B, 54a, n. 27) was predetermined by the lower court's improper analysis.

II.

THE RULING OF A PRIOR APPEALS COURT PANEL IN *CONTRACTORS II* PRECLUDED A CONFLICTING DETERMINATION BY THE PANEL IN *CONTRACTORS III* REGARDING THE INTENT OF THE ORDINANCE OR THE ADMISSIBILITY AND SUFFICIENCY OF EVIDENCE OF RACIAL DISCRIMINATION.

The panel of the Court of Appeals in *Contractors II* analyzed the provisions of the Ordinance at the summary judgment stage of the case. The Court of Appeals found that on its face the ordinance complied with crucial factors established in *Richmond v. Croson,* 488 U.S. 469, 109 S. Ct. 706 (1989). In *Contractors II,* the lower court found that the ordinance " . . . provides for several types of waivers of the fifteen percent goal. It exempts individual contracts, and classes of contracts from the Ordinance . . . to ensure adequate competition" and reasonable prices, § 17-505(1)(2). (App. J, 333a-334a, 350a-351a). It allows prime contractors to request waivers of the fifteen percent goal upon showing a good faith effort to achieve the goal, § 17-505(3). (App. J, 334a, 351a). It eliminates economically successful

minority businesses from the program. It complies with *Croson*'s admonition regarding geographical targeting and allows waivers and exemptions where minority contractors are not available within the targeted area, § 17-505(1)(2). (App. J, 333a-334a, 350a-351a). *Contractors II,* 6 F.3d at 1009. (App. D, 163a-164a).

The *Contractor II* decision regarding the effect of the provisions of the Ordinance must control a facial challenge to the Ordinance and cannot be ignored or diluted by evidence produced to satisfy an as applied attack on the Ordinance.

In the *Contractors II* Opinion, the Court of Appeals panel considered the language of the Ordinance regarding various categories of beneficiary groups with regard to issues of standing and severability of sections of the Ordinance. The *Contractors II* panel decided that a study by Dr. Andrew Brimmer, that concluded there was a Philadelphia construction contracts disparity index of 4 out of a possible 100, was significant enough to be probative of discrimination in City contracting in the Philadelphia construction industry and was admissible at the trial.

In response to Respondents' attack on the study, the *Contractors II* panel held that the study did not have to focus on prime contractors or consider the qualifications of minority contractors.

The panel in *Contractors III* essentially overruled the *Contractors II* panel by making a distinction between the application of the Ordinance to prime contractors and subcontractors and concluding that since the Petitioners' Ordinance was *applied* "almost exclusively" to subcontractors, it was not narrowly tailored to address discrimination among prime contractors. Not only does *Contractors III* refute

Contractors II, it admittedly uses the application of the Ordinance to contradict its facial meaning.

The Court of Appeals affirmed the ruling of the district court that "passive" discrimination by the City was not demonstrated with respect to active discrimination by non-minority prime contractors or by contractor associations. 91 F.3d at 599-602. (App. B, 32a-34a).

The *Contractors II* panel considered the admissibility at trial of the affidavit of Dr. Brimmer submitted by the Petitioners pursuant to the summary judgment motions. In the affidavit and, as observed by the district court, at trial, Dr. Brimmer opined that the City was involved in such passive discrimination. 893 F. Supp. at 427-429. (App. C, 70a-77a). Upon consideration of the affidavit in *Contractors II*, the Court of Appeals unequivocally ruled: ". . . the Brimmer affidavit and study were admissible evidence." 6 F.3d at 1004. (App. D, 151a).

The ruling as to the admissibility of the Brimmer study constituted the law of the case. The district court held that the City was not involved in passive discrimination by ruling that Dr. Brimmer's opinions and study were inadmissible as a matter of law. *Contractors Association of Eastern Pennsylvania, Inc. v. Philadelphia*, 893 F. Supp. at 430, 436-437. (App. C, 76a, 79a-80a, 87a, 95a-96a). By affirming the district court, the *Contractors III* panel, violated the law of the case doctrine.

Under the law of the case doctrine, once an issue in a case is decided, it will not be relitigated. *Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 165 (3d Cir. 1982). The doctrine provides that when a court decides upon a rule of law, that decision will continue to govern the same issues in subsequent stages in the same case. *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 1391 (1983). Except in extraordinary

circumstances, *i.e.*, an intervening change in controlling law, federal courts have consistently enforced the law of the case doctrine "to maintain consistency and avoid reconsideration of matters once decided during the course of a single lawsuit." *Casey v. Planned Parenthood,* 14 F.3d 848, 856, 862 (3d Cir. 1994). This "mandate rule" binds every court to honor rulings in the case by superior courts. *Casey* at 856. Thus, the law of the case doctrine requires district judges on remand to adhere to the mandate of the appellate court. *Id.* at 857.

The Third Circuit Internal Operating Procedure Rule No. 9.1, entitled "In Banc Consideration," in relevant part provides as follows:

> 9.1 Policy of Avoiding Intra-circuit Conflict of Precedent. It is the tradition of this court that the holding of a Panel in a reported opinion is binding on subsequent Panels. Thus, no subsequent Panel overrules the holding in a published opinion of a previous Panel. Court in banc consideration is required to do so.

The panel's decision in *Contractors II* precluded the district court from making its reliability qua admissibility determination with respect to the opinions of Dr. Brimmer, and the decision of the *Contractors II* panel precluded the *Contractors III* panel from affirming the district court's rejection of Dr. Brimmer's study. 6 F.3d at 1004-1005. (App. D, 150a-155a). The *Contractors II* panel ruled that "Brimmer's study provides the relevant statistical pool needed to satisfy *Croson* — the percentage of minority businesses engaged in the Philadelphia construction industry . . ." *Id.* at 1003 (App. D, 150a), and that it created "an inference of discrimination." *Id.* at 1007. (App. D, 158a-159a). On page 598 of its Opinion the *Contractors III*

panel agreed with the Petitioners that "*Contractors II* established as the law of the case the admissibility of Dr. Brimmer's analysis". (App. B, 24a). The *Contractors III* panel then observed that the district court was not required to consider Dr. Brimmer's opinions "uncritically." *Id.* However, the district court did not merely criticize Dr. Brimmer's opinions, it ruled that they were inadmissible as a matter of law, thus essentially reversing or ignoring the *Contractors II* decision on that issue.

The *Contractors III* panel affirmed the district court's rejection of Dr. Brimmer's disparity and discrimination opinions as a matter of law. In doing so, the *Contractors III* panel, violated the law of the case established in *Contractors II.*

CONCLUSION

The failure of the Court of Appeals panels in *Contractors I, Contractors II and Contractors III* to consider and analyze the Ordinance in the context of the facial challenge to the constitutionality of the Ordinance resulted in an improper analysis of the issues and an invalid determination by the Court of Appeals.

For all of the foregoing reasons the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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DATE: December 4, 1996

APPENDIX A — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED SEPTEMBER 5, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-1095

CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, INC.; GENERAL BUILDING CONTRACTORS ASSOCIATION, INC.; ASSOCIATED MASTER PAINTERS & DECORATORS OF PHILADELPHIA, INC.; EMPLOYING BRICKLAYERS ASSOCIATION OF DELAWARE VALLEY, INC.; INTERIOR FINISH CONTRACTORS ASSOCIATION, INC.; MECHANICAL CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, INC.; ROOFING AND SHEET METAL CONTRACTORS ASSOCIATION, INC.; SUB-CONTRACTORS ASSOCIATION OF DELAWARE VALLEY, INC.; NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC.

v.

CITY OF PHILADELPHIA; ELIZABETH REVEAL, AS DIRECTOR OF FINANCE FOR THE CITY OF PHILADELPHIA; CURTIS JONES, JR., AS DIRECTOR OF THE MINORITY BUSINESS ENTERPRISE COUNCIL; UNITED MINORITY ENTERPRISE ASSOCIATES, INC.

City of Philadelphia, Elizabeth Reveal, as Director of Finance for the City of Philadelphia and Curtis Jones, Jr., as Director of the Minority Business Enterprise Council
Appellants in No. 95-1095

Appendix A

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, and ROSENN,*
Circuit Judges

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Walter K. Stapleton
Circuit Judge

Dated: SEP 5 1996

by/cc: JHW JPC
JJM LEW
MIE CWB
JAD KS
RTV

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* Senior Judge Rosenn's vote is limited to rehearing before the original panel only.

APPENDIX B — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JULY 31, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 95-1095 and 95-1138

CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, INC.; GENERAL BUILDING CONTRACTORS ASSOCIATION, INC.; ASSOCIATED MASTER PAINTERS & DECORATORS OF PHILADELPHIA, INC.; EMPLOYING BRICKLAYERS ASSOCIATION OF DELAWARE VALLEY, INC.; INTERIOR FINISH CONTRACTORS ASSOCIATION, INC.; MECHANICAL CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, INC.; ROOFING AND SHEET METAL CONTRACTORS ASSOCIATION, INC.; SUB-CONTRACTORS ASSOCIATION OF DELAWARE VALLEY, INC.; NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC.

v.

CITY OF PHILADELPHIA; ELIZABETH REVEAL, AS DIRECTOR OF FINANCE FOR THE CITY OF PHILADELPHIA; CURTIS JONES, JR., AS DIRECTOR OF THE MINORITY BUSINESS ENTERPRISE COUNCIL; UNITED MINORITY ENTERPRISE ASSOCIATES, INC.

City of Philadelphia, Elizabeth Reveal, as Director of Finance for the City of Philadelphia and Curtis Jones, Jr., as Director of the Minority Business Enterprise Council
Appellants in No. 95-1095

United Minority Enterprise Associates, Inc.
Appellant in No. 95-1138

Appendix B

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 89-cv-02737)

Argued December 7, 1995

BEFORE: STAPLETON, SAROKIN and ROSENN, *Circuit Judges*

(Opinion Filed July 31, 1996)

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Appendix B

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OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

The City of Philadelphia (City) and intervening defendant United Minority Enterprise Associates (UMEA) appeal from the district court's judgment declaring that the City's set-aside program for black construction contractors, Phila. Code § 17-500 et. seq. (Chapter 17-500 or Ordinance), violates the Equal Protection rights of the Contractors Association of Eastern Pennsylvania (CAEP) and eight other contracting associations (Contractors). We agree with the district court that Chapter 17-500 is not narrowly tailored to serve a compelling state interest, and we will affirm.

I.

Chapter 17-500 was adopted by the Philadelphia City Council in November of 1982. As originally enacted, it contained a sunset provision calling for it to expire after seven years. In May of 1987, Council extended the ordinance until January 1, 1998. In 1988, the program was amended *inter alia* to include the set-aside for handicapped persons.

Appendix B

The preamble of Chapter 17-500 set forth only the following general legislative findings:

> WHEREAS, ... in the City of Philadelphia Minorities constitute approximately forty-six percent of the population including thirty-eight percent Black, five percent Spanish surname, two percent Oriental and one percent Indian and women constitute approximately fifty percent of the population; and
>
> WHEREAS, A pattern of past and present racial, sexual and economic discrimination have unfairly limited the ability of Minority and Female Owned Businesses to compete for an equitable share of such contracts with the City of Philadelphia; and
>
> WHEREAS, The citizens of Philadelphia share a commitment to the eradication of present manifestations of such discrimination; and
>
> * * * * * *
>
> WHEREAS, A series of goals for Minority and Female Owned Business participation would increase such participation and eradicate such manifestations and so that they will reach economic parity with majority businesses at large ....

Appendix B

The preamble of the 1987 Ordinance extending the program includes the following additional legislative findings:

> WHEREAS, Economic parity with majority businesses at large has not yet been reached, and based on the progress already demonstrated, cannot be reached within the remaining effective period of this Chapter; and
>
> WHEREAS, The Council desires to extend the effective period of this Chapter in order to more fully implement its goals program in the economic development of Minority and Female Owned Businesses, and to help eliminate the large amount of unemployment among the City's population -- particularly its minority population. . . .

No additional legislative finding relevant to the issues before us has been made.

Chapter 17-500, in its current form, seeks to increase the participation of "disadvantaged business enterprises" (DBEs) in City contracting. DBEs are businesses defined as those at least 51% owned by "socially and economically disadvantaged" persons. "Socially and economically disadvantaged" persons are, in turn, defined as "individuals who have . . . been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired

due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." Phila. Code § 17-501(11). As we found in *Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 6 F.3d 990, 999 (3d Cir. 1993) (*Contractors II*),[1] this definition "includes only individuals who are both victims of prejudice based on status and economically deprived." Businesses majority-owned by racial minorities (minority business enterprises or MBEs) and women are rebuttably presumed to be DBEs, *see* § 17-501(11) (a), but businesses that would otherwise qualify as DBEs are rebuttably presumed not to be DBEs if they have received more than $5 million in City contracts.

Chapter 17-500 sets participation "goals" for different categories of DBEs: racial minorities (15%), women (10%) and handicapped (2%). These percentage goals are percentages of the total dollar amount spent by the City in each of the three contract categories: vending contracts, construction contracts, and personal and professional service contracts. Dollars received by DBE *subcontractors* in connection with City financed prime contracts are counted towards the goals as well as dollars received by DBE *prime* contractors.[2]

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1. We shall refer to our prior opinions as *Contractors I* and *Contractors II*. Since it is the only opinion of the district court we shall discuss, any references to the district court's opinion will refer to the opinion filed in the present appeal, *Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 893 F. Supp. 419 (E.D. Pa. 1995).

2. When a DBE wins a prime contract the entire contract price of the prime contract is counted towards the goals, assuming that the DBE performs 51% of the work and takes responsibility for all of it. When DBEs are subcontractors, only the dollars paid by the prime contractor to the DBEs are counted towards the goals.

Appendix B

The 1982 Ordinance created the Minority Business Enterprise Council (MBEC) to oversee the set-aside program, promulgate regulations, and certify the eligibility of contractors to participate.[3] Under the program, each City agency is expected to meet the participation goal in each type of contract. The MBEC or an agency may recommend exempting individual contracts or groups of contracts from Chapter 17-500's requirements when there are insufficient DBEs in the Philadelphia Standard Metropolitan Statistical Area to ensure adequate competition and reasonable prices for the contracts. § 17-505(1) & (2).

Chapter 17-500 and its implementing regulations call for City agencies and the MBEC to formulate an annual plan for achieving the established goal in the construction area. *See* MBEC Reg. §§ 5, 11. Two different strategies are authorized. When there are sufficient DBEs qualified to perform a City contract to ensure competitive bidding, a contract can be let on a sheltered market basis — i.e., only DBEs will be permitted to bid. In other instances, the contract will be let on a non-sheltered basis — i.e., any firm may bid — with the goals requirements being met through subcontracting. The sheltered market strategy has seen little use. It was attempted on a trial basis, but there were too few DBEs in any given area of expertise to ensure reasonable prices, and the program was abandoned.[4] *See* App.

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3. The MBEC was charged with ascertaining "the total number of Minority and Female Owned Businesses in the Philadelphia Standard Metropolitan Statistical Area" (the Philadelphia SMSA) within ninety days of the original staffing of the MBEC. Thereafter, it was to "[s]urvey [those] businesses . . . to establish past and current participation levels." The district court found the Philadelphia SMSA to be the relevant geographic area for the purposes of its inquiry.

4. Typically, the City receives at least ten bids for a contract, a number

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at 262-63. Evidence submitted by the City indicates that no construction contract was let on a sheltered market basis from 1988 to 1990, *see* App. at 4493, and there is no evidence that the City has since pursued that approach. Consequently, the Ordinance's participation goals have been achieved almost entirely by insisting that bidding prime contractors subcontract work to DBEs in accordance with the goals.

When the goals are to be achieved by imposing subcontracting requirements, each would-be prime contractor must submit a "Schedule for Participation" (Schedule) of DBEs or a "Request for Waiver." *See* MBEC Reg. § 6.1. A Schedule details the names and addresses of participating DBE subcontractors, the type and amount of work they are to perform, and the dollar value of their services. A Request for Waiver consists of a statement that the contractor has made a good faith effort to utilize DBEs but has failed to meet the goals for the contract, along with documentation of the good faith effort and a list of those DBEs with whom the contractor was able to make commitments. § 6.1(C).

Compliance with Chapter 17-500's goals is to be considered "an element of responsiveness" of the bid when an agency awards a contract. § 6.1(A). The significance of complying with the goals is determined by a series of presumptions. Where at least one bidding contractor submits a satisfactory Schedule for Participation, it is presumed that all contractors who did not submit a satisfactory Schedule did not exert good faith efforts

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(Cont'd)
that assures competitive bidding and reasonable prices. Minutes from MBEC meetings indicate that, when the sheltered market approach was attempted, the City sometimes received as few as four bids and, as a result, the lowest bid substantially exceeded the City's estimated cost for the project.

to meet the program goals, and the "lowest responsible, responsive contractor" gets the contract. 6.1(D). Where none of the bidders submits a satisfactory Schedule, it is presumed that all but the bidder who proposes "the highest goals" of DBE participation at a "reasonable price" did not exert good faith efforts, and the contract is awarded to the "lowest, responsible, responsive contractor" who is granted a waiver and proposes the highest level of DBE participation at a reasonable price. § 6.1(E). Non-complying bidders in either situation must rebut the presumption in order to secure a waiver.

The district court found that the practical effect of the regulations and the system of presumptions is to create a protected segment of City construction work for which non-DBE contractors could not compete. *See Contractors Ass'n v. City of Philadelphia*, 893 F. Supp. 419, 426 (E.D. Pa. 1995). During the late 1970s, the contractors who obtained the contracts for the bulk of all public works contracts in the Philadelphia SMSA tended to use their own workforces and equipment to perform the necessary work, and subcontractors were used only when special skills were required. *Id.* After the enactment of Chapter 17-500, non-MBE contractors had to engage in "creative subcontracting," carving out portions of the contract for DBEs that they would otherwise have done themselves. *Id.* at 426 n.5.

The City's own records substantiate the effect of Chapter 17-500. MBEs have participated in nearly every public works contract let by the City, usually at or near the participation goal.[5]

5. The MBEC's 1986 Mid-Year Participation Report, for instance, states that the City achieved approximately 19 percent MBE participation in public works. App. at 2884. The report lists every public works contract let in a six-month period, and on nearly every contract, MBE participation was near or above 15 percent. Reports for other years reflected MBE participation on nearly all contracts, although the aggregate participation level achieved has not always exceeded 15 percent.

Appendix B

Prime contracts awarded to MBEs constituted only a small fraction of the contract amounts counted towards the participation goal.[6] Chapter 17-500 thus is essentially a subcontracting set-aside-program.

II.

This appeal is our third occasion to consider this challenge to Chapter 17-500. On the first appeal, we affirmed the district court's ruling that the Contractors had standing to challenge the set-aside program, but reversed the grant of summary judgment in their favor because UMEA had not been afforded a fair opportunity to develop the record. *See Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 945 F.2d 1260 (3d Cir. 1991) (*Contractors I*). On the second appeal, we reviewed a second grant of summary judgment for the Contractors. *See Contractors II*, 6 F.3d 990. We first concluded that the Contractors had standing to challenge the program only as it applied to the award of construction contracts. We then held that the pre-enactment evidence available to the City council in 1982 did "not provide a sufficient evidentiary basis" for a conclusion that there had been discrimination against women and minorities in the construction industry. 6 F.3d at 1003. We further held, however, that evidence of discrimination obtained after 1982 could be considered in determining whether there was a sufficient evidentiary basis for Chapter 17-500.

After-evaluating both the pre-enactment and post-enactment evidence in the summary judgment record, we affirmed the grant

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6. In 1993, for instance, of 452 public works contracts let by the City, only 2 were awarded to MBEs. During the same fiscal year, the City achieved a 11.5 percent participation rate. Other than the 2 prime contracts, the rate was achieved entirely from subcontracting by MBES.

of summary judgment insofar as it declared to be unconstitutional those portions of the program requiring set-asides for women and non-black minority contractors. We further held that the two percent set-aside for the handicapped passed rational basis review and ordered the court to enter summary judgment for the City with respect to that portion of the program. Finally, we concluded that the portions of the program requiring a set-aside for black contractors could stand only if they met the "strict scrutiny" standard of Equal Protection review and that the record reflected a genuine issue of material fact as to whether they were narrowly tailored to serve a compelling interest of the City as required under that standard. The present appeal follows a nine-day bench trial and a resolution by the district court of the issues thus presented. That trial and this appeal thus concern only the constitutionality of Chapter 17-500's preferences for black contractors.

III.

At trial, the City presented the work of Dr. Andrew F. Brimmer.[7] That work, which was done in 1992 after the filing of this suit, is reflected in two pretrial affidavits (Brimmer Affidavits I & II),[8] and his trial testimony. The core of his

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7. Dr. Brimmer is the President of Brimmer & Company, Inc., a financial and economic consulting firm located in Washington. D.C. App. at 3936. Brimmer & Company conducts research and advises clients concerning, among other things, trends in economic activity and prospects. *Id.* Brimmer & Company has consulted on three studies of statistical disparities and discrimination in local markets on behalf of Atlanta, Georgia; Dade County, Florida; and St. Louis, Missouri. *Id.* at 3938-39.

8. The first affidavit examined all minority business enterprises. *See*

(Cont'd)

analysis concerning discrimination by the City centered on disparity indices prepared using data from fiscal years 1979-81. The disparity indices were calculated by dividing the percentage of all City construction dollars received by black construction firms by their percentage representation among all area construction firms, multiplied by 100.[9] Dr. Brimmer testified

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App. at 3936. Subsequent to *Contractors II*, Dr. Brimmer tailored his study in a second affidavit to examine only black construction contractors because we had narrowed the inquiry to such contractors (Brimmer Affidavit II). *See* App. at 4501. Both affidavits drew on the same original study of disparity in minority participation in City contracting (Brimmer Study), and the critical statistical evidence offered by Dr. Brimmer in both were disparity indices.

9. The disparity indices were calculated by "dividing the percentage participation in dollars of minority groups in the public works contracts awarded by the City of Philadelphia by their percentage availability or composition in the 'population' of Philadelphia area construction firms and multiplying the results by 100." Brimmer Affidavit I, App. at 3941.

$$\frac{\$ \text{ to MBEs} \div \$ \text{ on all prime contracts}}{\#\text{ MBEs} \div \text{total } \#\text{ of contractors}} \times 100 = \text{Index}$$

To calculate an index only for black contractors, Dr. Brimmer used data for black contractors in place of data for MBES. The Brimmer Study was based on data from: (1) the federal government's 1982 Census of Construction Industries, which included the Philadelphia construction industry; and (2) data from the City consisting of (a) a directory and one-page summary of minority business enterprises (MBES) in the Philadelphia area in 1982, prepared by the City, and (b) a report that the City submitted to the U.S. House of Representatives Committee on Small Business, dated March 1982, which contained the total dollar value of City-financed prime contracts awarded to minorities in fiscal years 1979, 1980, and 1981.

(Cont'd)

that the disparity index for black construction firms in the Philadelphia metropolitan area for the period studied was about 22.5. According to Dr. Brimmer, the smaller the resulting figure was, the greater the inference of discrimination, and he believed that 22.5 was a disparity attributable to discriminations.[10] A

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For Brimmer Affidavit II, Dr. Brimmer constructed the disparity index for black businesses using data from 1979-81. There were five prime contracts awarded to MBEs for a total of $667,501, which was divided by the total for all public works contracts awarded, $419,779,641, or 0.1 percent. This figure was the "participation rate." The availability of black businesses was calculated using the City-supplied figure of 114 available black construction firms (BCFs) in the Philadelphia SMSA in 1982, divided by the federal census figure of 8050 total construction firms with employees in the Philadelphia SMSA at the same time. This yielded an "availability rate" of 1.4%. Dividing the participation rate by the availability rate and multiplying by 100, he calculated a disparity index of 11.4.

$$\frac{\$667{,}501.00 \div \$419{,}779{,}641.00}{114 \text{ BCFs} \div 8050 \text{ total firms}} \times 100 = 11.4$$

On direct examination, Dr. Brimmer recognized that the city figure of 114 had included black architectural and engineering firms, and such firms were not included in the 8050 total firm number. The correct number was 57 BCFS. For the record, he recalculated the appropriate disparity index for BCFs using the 57 figure, which yielded a disparity index of 22.5. *See* App. at 1198. Whether 11.4 or 22.5, disparities of this magnitude, according to Dr. Brimmer, were attributable to racial discrimination.

10. Dr. Brimmer described the import of the disparity indices as follows:

> As participation approaches availability, the disparity index approaches 100, and therefore fully equitable

(Cont'd)

number of witnesses testified to discrimination in City contracting before the City Council, prior to the enactment of Chapter 17-500. Dr. Brimmer believed that his statistical evidence was corroborated by their testimony.

Based on information provided in an affidavit by John Macklin, a former City employee, Dr. Brimmer also concluded that black representation in contractor associations was disproportionately low in 1981 and that between 1979 and 1981 black firms had received no subcontracts on City-financed construction projects.

The City also offered evidence concerning two programs instituted by others prior to 1982 which were intended to remedy the effects of discrimination in the construction industry but which, according to the City, had been unsuccessful. The first was the Philadelphia Plan, a program initiated in the late 1960s to increase the hiring of minorities on public construction sites. The second was a series of programs implemented by the Philadelphia Urban Coalition, a non-profit organization (Urban coalition programs). These programs were established around 1970, and offered loans, loan guarantees, bonding assistance, training, and various forms of non-financial assistance concerning the management of a construction firm and the

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> participation would achieve an index of 100, whereas complete exclusion would produce a score of 0. Thus, the nearer the measure is to 0 or the lower the value of the disparity index, the greater the extent of racial disparity and the stronger the inference of discrimination.

Brimmer Affidavit I, App. at 3941.

procurement of public contracts. According to a former City Councilmember, Joseph Coleman, and the former General Counsel of the Urban Coalition, Oscar Gaskins, although both programs had some successes, neither program succeeded in eradicating the effects of discrimination.

The City pointed to the waiver and exemption sections of the Ordinance as proof that there was adequate flexibility in its program. Finally, the City contended that its fifteen percent goal was appropriate. Although greater than the percentage of minority contractors (2.4%) and black contractors (0.7%) in the Philadelphia SMSA, it is not tied directly to the proportion of minorities (41.8%) or blacks (37.9%) in the local population. The City maintained that the goal of fifteen percent may be required to account for waivers and exemptions allowed by the City, is a flexible goal rather than a rigid quota in light of the waivers and exemptions allowed by the Ordinance, and is justified in light of the discrimination in the construction industry.

The Contractors presented testimony from an expert witness, Dr. LaNoue,[11] challenging the validity and reliability of Dr. Brimmer's work and conclusions. Dr. LaNoue testified to many problems in the design of Dr. Brimmer's study, including, *inter alia*, the data used, the assumptions underlying the study, and the failure to include federally-funded contracts let through the City Procurement Department.

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11. Dr. LaNoue is the Director of the Project on Civil Rights and Public Contracts at the University of Maryland in Baltimore. App. at 1739-41. He is also a Professor of Political Science and the Director of its Policy Sciences Graduate Program. He has recently researched and written on the appropriate legal and social service standards for *post-Croson* disparity studies. *See, e.g., The Local Officials Guide to Minority Business Programs and Disparity Studies: Responding to the Supreme Court's Mandate in City of Richmond v. Croson,* National League of Cities (1994).

The Contractors relied heavily on the legislative history of Chapter 17-500, pointing out that it reflects no identification of any specific discrimination against black contractors and, indeed, no data from which a Councilperson could find that specific discrimination against black contractors existed or that Chapter 17-500 was an appropriate remedy for any such discrimination. They pointed as well to the absence of any consideration of race-neutral alternatives by the City Council prior to enacting the Ordinance. On cross-examination of Oscar Gaskins, the Contractors elicited testimony that indicated that the Urban Coalition programs were relatively successful, undermining the contention that race-based preferences were needed. Finally, the Contractors argued that the fifteen percent figure must have been simply picked from the air and had no relationship to any legitimate remedial goal because the City Council had had no evidence of identified discrimination before it.

At the conclusion of the trial, the district court made extensive findings of fact and conclusions of law. It determined that the record reflected no "strong basis in evidence" for a conclusion that discrimination against black contractors was practiced by the City, non-minority prime contractors, or contractors associations during any relevant period. 893 F. Supp. at 447. The court also determined that Chapter 17-500 was "not 'narrowly tailored' to even the perceived objective declared by City Council as the reason for the Ordinance." *Id.* at 441.

IV.

We review the district court's findings of fact for clear error. *Sheet Metal Workers Int'l Ass'n Local 19 v. 2300 Group, Inc.*, 949 F. 2d 1274, 1278 (3d Cir. 1991). This includes the district court's determination regarding the accuracy of the facts or

assumptions on which the expert testimony was based. *Concrete Works of Colorado v. City & Cty. of Denver*, 36 F.3d 1513 (10th Cir. 1994) *cert. denied*, 115 S. Ct. 1315 (1995). However, "[u]ltimately, whether a strong basis in evidence of past or present discrimination exists, thereby establishing a compelling state interest for the municipality to enact a race-conscious ordinance, is a question of law," subject to plenary review. *Id.* at 1522. The same is true of the issue of whether there is a strong basis in evidence for concluding that the scope of the ordinance is narrowly tailored to remedy the identified past or present discrimination.

V.

The threshold issue raised by the parties concerns the burden of persuasion with respect to the issues tried by the district court. The City insists that the district court placed that burden upon it and that, in doing so, the district court ignored our holding in *Contractors II*. We disagree. To explain our disagreement, we need to begin with a brief summary of the governing Equal Protection law.

The current law of the land concerning the Equal Protection Clause and municipal, race-based, affirmative action programs is set forth in Justice O'Connor's opinion in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). All such affirmative action programs, when challenged, must be subjected to "strict scrutiny" review.[12] *Id.* at 493 (O'Connor, J., for four justices);

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12. Portions of Justice O'Connor's opinion were joined by a majority of the Justices. Other portions were not. However, it appears from the opinions of all of the justices that an affirmative action program that would survive strict scrutiny review as perceived in Justice O'Connor's opinion

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id. at 520 (Scalia, J., concurring). Accordingly, a program can withstand a challenge only if it is narrowly tailored to serve a compelling state interest. The municipality has a compelling state interest that can justify race-based preferences only when it has acted to remedy identified present or past discrimination in which it engaged or was a "passive participant;" race-based preferences cannot be justified by reference to past "societal,, discrimination in which the municipality played no material role. Moreover, the remedy must be tailored to the discrimination identified. To require less as a

> basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.

Id. at 505-06.

"Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice." *Id.* at 500. The municipality must justify its conclusions regarding discrimination in connection with the award of its construction contracts and the necessity for a remedy of the

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would be sustained by a majority of the justices and one that would not survive that review would not be sustained by a majority of the justices. As we explained in *Planned Parenthood v. Casey*, 947 F.2d 682 (3d Cir. 1991), that makes Justice O'Connor's opinion the current law of the land.

scope chosen. While this does not mean that the municipality must convince the court of the accuracy of its conclusions, it does mean that the program cannot be sustained unless there is a strong basis in evidence for those conclusions. The party challenging the race-based preferences can succeed by showing either (1) that the subjective intent of the legislative body was not to remedy race discrimination in which the municipality played a role, or (2) that there is no "strong basis in evidence" for the conclusions that race-based discrimination existed and that the remedy chosen was necessary. *Id.* at 500, 510 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986)).

The purpose and importance of this "strict scrutiny" review are spelled out in *Croson*:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.
>
> Classifications based on race carry a

> danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.

Id. at 493.

Although the Court did not speak directly in *Croson* to the allocation of the burdens of proof and persuasion, this subject was addressed by this court in *Contractors II*, 6 F.3d at 1005-07, and, more recently, by the Tenth Circuit Court of Appeals in *Concrete Works of Colorado*, 36 F.3d at 1521-23. Both courts concluded that when the race-based classifications of an affirmative action plan are challenged, the proponents of the plan have the burden of coming forward with evidence providing a firm basis for inferring that the legislatively identified discrimination in fact exists or existed and that the race-based classifications are necessary to remedy the effects of the identified discrimination. Once the proponents of the program meet this burden of production, the opponents of the program must be permitted to attack the tendered evidence and offer evidence of their own tending to show that the identified discrimination did or does not exist and/or that the means chosen as a remedy do not "fit" the identified discrimination.

Ultimately, however, the plaintiffs challenging the program retain the burden of persuading the district court that a violation of the Equal Protection Clause has occurred. This means that the plaintiffs bear the burden of persuading the court that the race-based preferences were not intended to serve the identified compelling interest or that there is no strong basis in the evidence as a whole for the conclusions the municipality needed to have

reached with respect to the identified discrimination and the necessity of the remedy chosen.

The significance of the allocation of the burden of persuasion differs depending on the theory of constitutional invalidity that is being considered. If the theory is that the race-based preferences were adopted by the municipality with an intent unrelated to remedying its past discrimination, the plaintiff has the burden of convincing the court that the identified remedial motivation is a pretext and that the real motivation was something else. As we noted in *Contractors II*, the burden of persuasion here is analogous to the burden of persuasion in Title VII cases. 6 F.3d at 1006.The ultimate issue under this theory is one of fact, and the burden of persuasion on that ultimate issue can be very important.

The situation is different when the plaintiff's theory of constitutional invalidity is that, although the municipality may have been thinking of past discrimination and a remedy therefor, its conclusions with respect to the existence of discrimination and the necessity of the remedy chosen have no strong basis in evidence. In such a situation, when the municipality comes forward with evidence of facts alleged to justify its conclusions, the plaintiff has the burden of persuading the court that those facts are not accurate. The ultimate issue as to whether a strong basis in evidence exists is an issue of law, however. The burden of persuasion in the traditional sense plays no role in the court's resolution of that ultimate issue.

In *Contractors II*, we were presented with a summary judgment issue. We sustained the district court's grant of summary judgment with respect to some of plaintiffs' claims and reversed it as to others. We concluded that the City, in response to the plaintiffs' motion for summary judgment, had

come forward with no evidence that, if credited after testing in the crucible of trial, would support an inference that there had been discrimination by the City in the contracting industry against Hispanic, Asian-American, or Native American persons or women. We held that "plausible hypotheses are not enough to satisfy strict scrutiny, even at the summary judgment stage." *Id.* at 1008. Accordingly, summary judgment was sustained with respect to the set-asides for those groups. On the other hand, we held that Dr. Brimmer's expert analysis along with the City's anecdotal evidence, if credited, could provide a firm basis for the inference that there had been discrimination against blacks in connection with City-financed construction contracts and that the program was narrowly tailored to remedy the effects of such discrimination. We therefore reversed the contractors' summary judgment regarding the set-aside for black contractors and remanded for a trial.

We agree with the City that *Contractors II* established as the law of the case the admissibility of Dr. Brimmer's analysis. Neither this nor our observations regarding the burden of persuasion, however, required the district court to accept that analysis and Dr. Brimmer's opinions uncritically. Like any other trier of fact called upon to evaluate expert testimony, it was entitled to accept or reject the facts and assumptions upon which the expert testimony was based and to evaluate the methodology that underlay it. And, of course, the district court was required in the final analysis to determine whether Dr. Brimmer's analysis and the City's anecdotal evidence, when viewed in the context of the Contractors' evidence, constituted the "strong basis in evidence" required by the Equal Protection Clause.

The district court's opinion explicitly demonstrates its recognition that the plaintiffs bore the burden of persuading it

that an equal protection violation occurred.[13] As we read the opinion, it applied the appropriate burdens of production and persuasion and conducted the required evaluation of the evidence. As we have indicated, it examined the credited record evidence as a whole and concluded that the "strong basis in evidence" for the City's position did not exist.[14]

VI.

As we have indicated, "[w]hile the States and their

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13. For example, the court states:

> Once a challenge to race-conscious legislation has been raised, that party bears the ultimate burden of proving that the legislation is unconstitutional. *Contractors Ass'n of Eastern Pennsylvania, Inc. v. Philadelphia*, 6 F.3d 990, 1005 (3d Cir. 1993). The local government, in resisting such a challenge, must show a "strong basis in evidence" to support its racial classifications. *Croson*, 488 U.S. at 492.

893 F. Supp. at 424.

14. As the Contractors stress, the district court also found as follows in a footnote to its findings of fact:

> The legislative history of Chapter 17-500 is replete with references which prove that City Council's enactment of Chapter 17-500 was motivated by racial and gender politics, and not the remediation of any specifically identified discrimination in the Philadelphia construction industry.

893 F. Supp. at 445 n.24. We do not reach this issue.

subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief." *Croson*, 488 U.S. at 504. It necessarily follows that a court cannot conduct the strict scrutiny review required by *Croson* without first identifying with specificity the discrimination allegedly giving rise to the compelling state interest.

In November of 1982, the City Council found only in general terms that a pattern of discrimination against minority contractors existed that had resulted in their receiving less than their "equitable share" of City construction dollars. Subsequently, in the course of this litigation, however, several distinct forms of racial discrimination have been advanced as producing that result. The first is discrimination by prime contractors in the awarding of subcontracts. The second is discrimination by contractor associations in admitting members. The third is discrimination by the City in the awarding of prime contracts. The City would, of course, be directly responsible for the last form of discrimination. The City and UMEA insist that the City may have "passively participated" in the other two forms of discrimination.

Since these three forms of discrimination involve discrimination by different decisionmakers in different markets, we must independently determine whether there is a strong basis in the evidence for believing that each particular form of discrimination existed. In determining whether Chapter 17-500 is narrowly tailored, we can look only to the form or forms of discrimination for which a firm evidentiary basis exists.[15]

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15. In adopting this approach, we disagree with the UMEA's insistence (Cont'd)

Appendix B

A. *The Evidence of Discrimination by Private Prime Contractors*

One of the City's theories is that discrimination by prime contractors in the selection of subcontractors existed and may be remedied by the City.[16] As Justice O'Connor observed in *Croson*:

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that two other forms of racial discrimination are relevant here. In the summary of its argument, the UMEA states:

> The district court's finding of fact that there is no credible evidence of racial discrimination in the Philadelphia construction industry prior to the enactment of Chapter 17-500 is clearly erroneous. The City and UMEA proffered sufficient statistical, anecdotal and historical evidence of such discrimination in the Philadelphia construction industry in general, and in City public works prime contracting in particular.

Appellant UMEA's brief at 4-5. Later, in its brief, the UMEA relies heavily on evidence of past discrimination by local unions. We read *Croson* to teach that, while evidence of racial discrimination in the construction industry as a whole and evidence of prior racial discrimination by unions may be probative of past societal discrimination, neither will alone justify a municipality in adopting a race-based remedy. We discuss below in text the relevant evidence of racial discrimination by the City in the market for prime contractors.

16. Prior to the Ordinance, the selection of subcontractors was not a part of the bidding process for prime contracts. After a contract was awarded, the prime contractor would get approval to use a particular subcontractor from the project engineer assigned to the contract by the City. At trial, John Smith, general manager of the Contractors Association of Eastern

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> if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, . . . the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity . . . has a compelling government interest in assuring that public dollars . . . do not serve to finance the evil of private prejudice.

488 U.S. at 492.

Dr. Brimmer's disparity study focuses on just one aspect of the Philadelphia construction industry — the award of prime contracts by the City. He acknowledged that the only information he had about subcontracting came from an affidavit of John W. Macklin supplied to him in the course of his study. As he stated on cross-examination, "I have made no presentation to the Court as to participation by black minorities or blacks in subcontracting. I couldn't possibly — either misleading or misinforming the Court because I didn't do it." App. at 1422.

The only record evidence with respect to black participation in the subcontracting market comes from Mr. Macklin. Based

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Pennsylvania and former member of the MBEC, testified on cross-examination by the City that ultimately, the prime contractor selected the subcontractors. App. at 363. His testimony was not contradicted, and we conclude, therefore, that if there was discrimination in subcontracting, it was largely done by prime contractors. Even if project engineers played some role in the selection, subcontracting presents a sufficiently different nexus of decision making that we should consider the evidence of its existence separately.

on a review of City records, found by the district court to be "cursory," Mr. Macklin reported that not a single subcontract was awarded to minority subcontractors in connection with City-financed construction contracts during fiscal years 1979 through 1981. The district court did not credit this assertion.

Mr. Macklin was a member of the MBEC staff and a proponent of Chapter 17-500. He had earlier served within the City's Office of Minority Opportunity (OMO) from 1981 to 1983.[17] Prior to 1982, for solely City-financed projects, the City did not require subcontractors to prequalify, did not keep consolidated records of the subcontractors working on prime contracts let by the City, and did not record whether a particular contractor was an MBE. To prepare a report concerning the participation of minority businesses in public works, Mr. Macklin examined the records at the City's Procurement Department. The department kept procurement logs, project engineer logs, and contract folders. The subcontractors involved in a project were only listed in the engineer's log. Mr. Macklin's testimony concerning his methodology was hesitant and unclear, but it does appear that he examined only 25 to 30 percent of the project engineer logs and that his only basis for identifying a name in that segment of the logs as an MBE was his personal memory of the information he had received in the course of approximately a year of work with the OMO. The district court found the following from Mr. Macklin's testimony:

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17. The OMO was created in 1980 by the City to certify the credentials and capabilities of minority contractors who were interested in contracting on the Urban Mass Transit Authority (UMTA) project. The UMTA was a federally-funded, $530 million project, and due to federal requirements, had a 10 percent minority set-aside requirement.

> [Macklin] went to the contract files and looked for contracts in excess of $30,000.00 that in his view appeared to provide opportunities for subcontracting. (*Id.* at 13.) With that information, Macklin examined some of the project engineer logs for those projects to determine whether minority subcontractors were used by the prime contractors. (*Id.*) Macklin did not look at every available project engineer log. (*Id.*) Rather, he looked at a random 25 to 30 percent of all the project engineer logs. (*Id.*) As with his review of the Procurement Department log, Macklin determined that a minority subcontractor was used on the project only if he personally recognized the firm to be a minority. (*Id.*) Quite plainly, Macklin was unable to determine whether minorities were used on the remaining 65 to 70 percent of the projects that he did not review. When questioned whether it was possible that minority subcontractors did perform work on some City public works projects during fiscal years 1979 to 1981, and that he just did not see them in the project logs that he looked at, Macklin answered "it is a very good possibility."

893 F. Supp. at 434.

The district court found two other portions of the record significant on this point. First, during the trial, the City presented Oscar Gaskins ("Gaskins"), former general counsel to the

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General and Specialty Contractors Association of Philadelphia ("GASCAP") and the Philadelphia Urban Coalition, to testify about minority participation in the Philadelphia construction industry during the 1970s and early 1980s. Gaskins testified that, in his opinion, black contractors are still being subjected to racial discrimination in the private construction industry, and in subcontracting within the City limits. However, when Gaskins was asked by the court to identify even one instance where a minority contractor was denied a private contract or subcontract after submitting the lowest bid, Gaskins was unable to do so.

Second, the district court noted that since 1979 the City's "standard requirements warn [would-be prime contractors] that discrimination will be deemed a 'substantial breach' of the public works contract which could subject the prime contractor to an investigation by the Commission and, if warranted, fines, penalties, termination of the contract and forfeiture of all money due." 893 F. Supp. at 438-39. Like the Court in *Croson*, the district court found significant the City's inability to point to any allegations that this requirement was being violated. *See id.* (citing *Croson*, 488 U.S. at 502, n.3).

The district court did not err by declining to accept Mr. Macklin's conclusion that there were no subcontracts awarded to black contractors in connection with City-financed construction contracts in fiscal years 1979 to 1981. Accepting that refusal, as we do, we agree with the district court's conclusion that the record provides no firm basis for inferring discrimination by prime contractors in the subcontracting market during that period.

Appendix B

B. *The Evidence of Discrimination by Contractor Associations*

A city may seek to remedy discrimination by local trade associations to prevent its passive participation in a system of private discrimination. *See Croson*, 488 U.S. at 503. Evidence of "extremely low" membership by MBEs, standing by itself, however, is not sufficient to support remedial action; the city must "link [low MBE membership] to the number of local MBEs eligible for membership." *Id.*

Dr. Brimmer opined that there was statistically low representation of eligible MBEs in the local trade associations. He testified that, while numerous MBEs were eligible to join these associations, three such associations had only one MBE member, and one had only three MBEs. In concluding that there were many eligible MBEs not in the associations, however, Dr. Brimmer again relied entirely upon the work of Mr. Macklin. The district court rejected Dr. Brimmer's conclusions because it found his reliance on Mr. Macklin's work misplaced.

The information relied upon by Dr. Brimmer is found only in an affidavit of Mr. Macklin that was admitted into evidence. In this affidavit, Mr. Macklin asserts that he "reviewed the membership provisions of the bylaws for each of the plaintiff Associations [and] the 1982 OMO Directory of Certified MBE and WBE firms to determine which of the firms were eligible to be members of plaintiff Associations." App. at 4486. "Based on those reviews," Mr. Macklin formed an opinion that a listed number of MBE and WBE firms were eligible to be members of the plaintiff Associations. *Id.*

Because Mr. Macklin did not set forth the criteria for association membership and because the OMO certification list

did not provide any information about the MBEs and WBEs other than their names and the fact that they were such, the district court found itself without a basis for evaluating Mr. Macklin's opinions.

On the other hand, the district court credited "the uncontroverted testimony of John Smith [a former general manager of the CAEP and member of the MBEC] that no black contractor who has ever applied for membership in the CAEP has been denied." 893 F. Supp. at 440. The court noted as well that the City had not "identified even a single black contractor who was eligible for membership in any of the plaintiffs' associations, who applied for membership, and was denied." *Id.* at 441.

The district court was required to ascertain whether there is a strong basis in the evidence for concluding that there had been discrimination against black contractors by contractor associations. Given the City's failure to present more than the essentially unexplained opinion of Mr. Macklin, the opposing, uncontradicted testimony of Mr. Smith, and the failure of anyone to identify a single victim of the alleged discrimination, it was appropriate for the court to conclude that a constitutionally sufficient basis was not established in the evidence.

Even if we were to accept Mr. Macklin's opinions, however, we could not hold that Chapter 17-500 is justified by that discrimination. As we have explained, racial discrimination can justify a race-based remedy only if the City has somehow participated in or supported that discrimination. This record would not support a finding that this occurred. Contrary to the City's argument, nothing in *Croson* suggests that awarding contracts pursuant to a competitive bidding scheme and without

reference to association membership could alone constitute passive participation by the City in membership discrimination by contractor associations. Prior to 1982, the City let construction contracts on a competitive bid basis. It did not require bidders to be association members, and nothing in the record suggests that it otherwise favored the associations or their members.[18] While City dollars went to low bidding contractors who, in many instances, paid dues to the Associations, this would not appear to us to constitute support for the membership practices of associations any more than the payment of City dollars to low bidding contractors who do business with discriminatory labor unions constitutes support for those unions. We know from *Croson* that the latter situation does not involve "passive participation" that will support a system of race-based preferences.[19] *See* 488 U.S. at 498-99.

C. *The Evidence of Discrimination by the City*

The record provides substantially more support for the proposition that there was discrimination on the basis of race in the award of prime contracts by the City in the fiscal 1979-1981 period. Moreover, we find the Contractors, critique of that evidence less cogent than did the district court.

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18. The UMEA points to testimony from Mr. Smith that the CAEP was advised by City agencies of the construction contracts they hoped to be awarding over the next six months or so. The record does not disclose, however, whether this information was or was not available to others who inquired.

19. Even if it be assumed that the payment of City dollars to low bidding contractors constitutes support for Association membership practices when the receiving contractor is an Association member, Chapter 17-500 does not fashion a remedy narrowly tailored to Association membership discrimination.

Appendix B

The centerpiece of the City's evidence was Dr. Brimmer's calculation of disparity indices which gauge the disparity in the award of prime contracts by the City. Following *Contractors II*, Dr. Brimmer calculated a disparity index for black construction firms of 11.4, based on a figure of 114 such firms available to perform City contracts. At trial, he recognized that the 114 figure included black engineering and architecture firms, so he recalculated the index, using only black construction firms (i.e., 57 firms). This produced a disparity index of 22.5. Thus, based on Dr. Brimmer's analysis, black construction firms would have to have received approximately 4.5 times more public works dollars than they did receive in order to have achieved an amount proportionate to their representation among all construction firms. Dr. Brimmer found the disparity sufficiently large to be attributable to discrimination against black contractors.

There are circumstances in which a disparity index of 22.5 can constitute a strong basis in evidence for inferring the existence of discrimination. *See Associated General Contractors of Cal. v. Coalition for Economic Equity*, 950 F.2d 1401, 1414 (9th Cir. 1991) (finding disparity equivalent to index of 22.4 sufficient to raise inference of discrimination) *cert. denied*, 503 U.S. 985 (1992); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir.) (finding disparity equivalent to index of approximately 50 sufficient to make prima facie case), *cert. denied*, 498 U.S. 983 (1990). We therefore turn to evaluate whether the record as a whole undermines the probative value of Dr. Brimmer's disparity index analysis.

The district court concluded that Dr. Brimmer's analysis, when viewed in the context of the entire record, did not provide a strong basis in evidence for an inference of discrimination in the prime contract market. It reached this conclusion primarily

for three reasons. Dr. Brimmer's study, in the district court's view, (1) did not take into account whether the black construction firms were qualified and willing to perform City contracts; (2) mixed statistical data from different sources; and (3) did not account for the "neutral" explanation that qualified black firms were too preoccupied with large, federally-assisted projects to perform City projects.

The district court was, of course, correct in concluding that a statistical analysis of the kind conducted by Dr. Brimmer should focus on the minority population capable of performing the relevant work. As *Croson* indicates, "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." 488 U.S. at 501 (quoting from *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 n.13 (1977)). In both *Croson* and *Hazelwood*, however, the discussion concerning qualifications came in the context of a rejection of an analysis using the percentage of a particular minority in the general population. The issue of qualifications can be approached at different levels of specificity, however, and some consideration of the practicality of various approaches is required. An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.

To the extent the district court found fault with Dr. Brimmer's analysis for failing to limit its consideration to those black contractors "willing" to undertake City work, we find its criticism more problematic. In the absence of some reason to believe otherwise, one can normally assume that participants in a market with the ability to undertake gainful work will be

"willing" to undertake it. Moreover, past discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure the work.

It seems to us a substantial overstatement to assert that Dr. Brimmer failed to take into account the qualifications and willingness of black contractors to participate in public works. During the time period in question, fiscal years 1979-81, those firms seeking to bid on City contracts had to prequalify for *each and every* contract they bid on, and the criteria could be set differently from contract to contract. It would be highly impractical to review the hundreds of contracts awarded each year and compare them to each and every MBE. Dr. Brimmer chose instead to use as the relevant minority population the black firms listed in the 1982 OMO Directory. This would appear to be a reasonable choice that, if anything, may have been on the conservative side.

Edward Robinson, the director of the OMO in 1982, testified that although the federal set-aside program for the Urban Mass Transit Authority ("UMTA") projects only required it to certify that a particular firm was a bona fide MBE, the OMO wanted to insure that the best possible MBEs participated in the federal projects. These projects were some of the largest public works in the area at the time. When a firm applied to be certified, the OMO required it to detail its bonding experience, prior experience, the size of prior contracts, number of employees, financial integrity, and equipment owned. The OMO visited each firm to substantiate its claims. Although this additional information did not go into the final directory, the OMO was confident that those firms on the list were capable of doing the work required on large scale construction projects.

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Of about 680 MBE and WBE firms that applied, only 241 were certified. Although Dr. Brimmer did not go over the qualification of each and every firm in the OMO Directory, the process by which the firms were certified appears to suggest that, as a general proposition, those firms were both qualified and willing to participate in public works projects. Conversely, since City-funded contracts ran the gamut from small to large projects, the OMO list may have been underinclusive in terms of firms capable of performing some portion of City projects.

The Contractors point to the small number of black firms that sought to prequalify for City-funded contracts as evidence that black firms were unwilling to work on projects funded solely by the City. During the time period in question, City records show that only seven black firms sought to prequalify, and only three succeeded in prequalifying. We think it would be inappropriate, however, to conclude that this evidence undermines Dr. Brimmer's inference of discrimination. As Dr. Brimmer indicated in his testimony, if there has been discrimination in City contracting, it is to be expected that black firms may be discouraged from applying, and the low numbers may tend to corroborate the existence of discrimination rather than belie it. In a sense, to weigh this evidence for or against either party requires us to presume the conclusion to be proved.

While it is true that Dr. Brimmer "mixed data," the weight given that fact by the district court seems excessive. Dr. Brimmer used data from only two sources in calculating the disparity index of 22.5. He used data that originated from the City to determine the total amount of contract dollars awarded by the City, the amount that went to MBEs, and the number of black construction firms. He "mixed" this with data from the Bureau of the Census concerning the number of total construction firms

(8050) in the Philadelphia Standard Metropolitan Statistical Area (PSMSA). The data from the City is not geographically bounded to the same extent that the Census information is. Any firm could bid on City work, and any firm could seek certification from the OMO. Nevertheless, due to the burdens of conducting construction at a distant location, the vast majority of the firms were from the Philadelphia region and the Census data offers a reasonable approximation of the total number of firms that might vie for City contracts. Although there is a minor mismatch in the geographic scope of the data, given the size of the disparity index calculated by Dr. Brimmer, we are not persuaded that it is significant.

Considering Dr. Brimmer's use of the OMO Directory and the Census data, it seems to us that the index of 22.5 may be a conservative estimate of the actual disparity. While Dr. Brimmer used a figure for black firms that took into account qualifications and willingness, he used a figure for total firms that did not. If he undercounted the number of black firms qualified and willing to undertake City construction contracts or overcounted the total number of firms qualified and willing to undertake City construction contracts, the actual disparity would be greater than 22.5. Further, while Dr. Brimmer limited the index to black firms, he did not similarly reduce the dollars awarded to minority firms. He continued to use the figure of $667,501, which represented the total amount going to all MBEs. If minorities other than blacks received some of that amount, the actual disparity would again be greater.

Finally, we turn to the district court's suggestion that the extensive participation of black firms in federally-assisted projects, which were also procured through the City's Procurement Office, accounts for their low participation in the

other construction contracts awarded by the City. In the fiscal years 1979-81, at least 22 black construction firms from the Philadelphia SMSA earned more than $18 million as subcontractors on 17 public works contracts let by the City. At least 15 of these contracts were federally funded.[20]. In fiscal year 1982, 20 to 25 minority firms, mostly black, won $50 million in subcontracts on the UMTA federally-assisted programs. The Contractors advanced these statistics to make three points: (a) that the City did not discriminate in procurement; (b) that black firms were unwilling to work on City projects because of their preoccupation with federal projects, and Dr. Brimmer's work is flawed because it does not take this factor into account; and (c) that even if Dr. Brimmer's analysis is probative, the preoccupation of black firms with federally assisted projects and their resulting unavailability for other City work projects provides a neutral explanation for his disparity.

The first contention may be readily dispensed with. Most, if not all, federally-funded projects were subject to a federal ten-percent set-aside, and the amount awarded to minorities was very near ten percent of the total amount awarded to all contractors. The evidence does not show, therefore, that the City did not discriminate in connection with contracts where its choice was unrestrained; rather, it simply shows that the City complied with federal requirements on federally-assisted projects.

The second and third contentions are essentially the same

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20. The amounts earned by black contractors in connection with the contracts were not included in Dr. Brimmer's disparity indices because he looked only to City-funded projects which were not subject to the ten-percent set-aside on federally assisted programs.

point, and raise the most difficult issues for the City. It would not be surprising that some of the largest and most experienced black firms would gravitate towards the large federally-assisted projects, where the subcontracts were likely to be sizable and there was a federal set-aside. Indeed, the record suggests that of the 57 black contractors considered qualified for City contracts by Dr. Brimmer, 20 to 22 succeeded in winning federally funded subcontracts and devoted their resources to federally funded projects. This work undoubtedly affected, to some degree, their ability to perform other City contracts. The court was thus undoubtedly right in suggesting that the availability of substantial amounts of federally funded work and the federal set-aside undoubtedly had an impact on the number of black contractors available to bid on other City contracts.

The extent of that impact is more difficult to gauge, however. That such an impact existed does not necessarily mean that Dr. Brimmer's analysis is without probative force. If, for example, one reduces the 57 available black contractors by the 20 to 22 that participated in federally assisted projects in fiscal years 1979-81 and takes 35 as a fair approximation of the black contractors available to bid on the remaining City work, Dr. Brimmer's analysis produces a disparity index of 37, a disparity that still suggests a substantial underparticipation of black contractors among the successful bidders on City prime contracts. On the other hand, the City's difficulty in the 1980s in getting sufficient numbers of black contractors to bid even on sheltered market prime contracts gives credence to the hypothesis that that underparticipation was attributable to a dearth, however it came about, of black contracting capacity available for prime city contracts.[21]

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21. Were we reviewing the district court's finding of fact regarding

(Cont'd)

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Whether this record provides a strong basis in evidence for an inference of discrimination in the prime contract market is a close call. In the final analysis, however, it is a call that we find unnecessary to make, and we chose not to make it.[22] Even assuming that the record presents an adequately firm basis for that inference, the judgment of the district court must be affirmed because Chapter 17-500 is clearly not narrowly tailored to remedy that discrimination.

VII.

As we have indicated, strict scrutiny review requires us to examine the "fit" between the identified discrimination and the remedy chosen in an affirmative action plan. *Croson* teaches that there must be a strong basis in evidence not only for a

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the Council's intent in 1982 at the time of the adoption of Chapter 17-500 (*See* footnote 14, *supra*), it would, of course, be inappropriate to consult the City's experience after that point. However, when the issue for decision is whether there is a strong basis in evidence for believing that City-sponsored discrimination existed and the City is relying on after-acquired evidence to support that position, it is appropriate to consider any evidence, pre- or post-enactment, relevant to the issue of whether such discrimination, or the effects thereof, existed prior to 1982. *Contractors II*, 6 F.3d at 1003-04; *Concrete Works of Colorado*, 36 F.3d at 1521.

22. We have considered the possibility that the City Council may choose to address in the future the need for a more narrowly tailored affirmative action program to remedy past discrimination. In that context, it may wish to consult Dr. Brimmer's work. However, any ruling that we might make regarding the probative value of that work in the context of any affirmative action program initiated to address conditions in 1979-1981 would be of limited, if any, value to a legislator assessing the necessity of such a program addressed to conditions more than fifteen years later.

conclusion that there is, or has been, discrimination but also for a conclusion that the particular remedy chosen is made "necessary" by that discrimination. 488 U.S. at 510.

Croson tells us that the degree of "fit" is important in this context for three reasons. First, the absence of a close fit renders suspect the claim that remedying the identified discrimination and resulting injury was the objective of the legislative measure. The fit must provide assurance with respect to purpose; the means chosen must fit the "compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Id.* at 493.

Second, the necessary effect of a race-based preference is the imposition of a race-based burden on citizens who have "personal rights" under the Equal Protection Clause "to be treated with equal dignity and respect." *Id.* That burden can be justified, if at all, only if it is close to the minimum necessary to redress the discrimination justifying the preference.

Finally, *Croson* recognizes that those in the disfavored class are not the only ones that can be burdened by a race-based preference. The favored class and society may also be burdened if the remedy extends significantly beyond the justification for the preference. "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Id.*

With this background, we turn to the issue of whether the Ordinance is narrowly tailored to serve a compelling state interest. That issue is, of course, shaped by our prior conclusions regarding the absence of a strong basis in evidence reflecting

discrimination by prime contractors in selecting subcontractors and by contractor associations in admitting members. This leaves as a possible justification for Chapter 17-500 only our assumption that the record provides a strong basis in evidence for believing the City discriminated against black contractors in the award of prime contracts during fiscal years 1979 to 1981. If the remedy reflected in the Ordinance cannot fairly be said to be necessary in light of the assumed discrimination in awarding prime construction projects, the Ordinance cannot stand. After careful scrutiny of the record, we hold, as did the district court, that the Ordinance is not narrowly tailored.

A. *Inclusion of Preferences in the Subcontracting Market*

The primary focus of the City's Chapter 17-500 program is the market for subcontracts to perform work included in prime contracts awarded by the City. While the program includes authorization for the award of prime contracts on a "sheltered market" basis, that authorization has been sparsely invoked by the City. Its goal with respect to dollars for black contractors has been pursued primarily through requiring that bidding prime contractors subcontract to black contractors in stipulated percentages. As we have explained, the 15 percent participation goal and the system of presumptions, which in practice require non-black contractors to meet the goal on virtually every contract, result in a 15% set-aside for black contractors in the subcontracting market.

Here, as in *Croson*, "[t]o a large extent, the set aside of subcontracting dollars seems to rest on the unsupported assumption that white contractors simply will not hire minority firms." 488 U. S. at 502. Here, as in *Croson*, there is no firm evidentiary basis for believing that non-minority contractors

will not hire black subcontractors. Rather, the evidence, to the extent it suggests that racial discrimination has occurred, suggests discrimination by the City's Procurement Department against black contractors who were capable of bidding on prime City construction contracts. To the considerable extent that Chapter 17-500's program seeks to constrain decision making by private contractors and favor black participation in the subcontracting market, it is ill-suited as a remedy for the discrimination identified.

We do not suggest that an appropriate remedial program for discrimination by a municipality in the award of primary contracts could never include a component that affects the subcontracting market in some way. We hold, however, that a program, like Philadelphia's current one, which focuses almost exclusively on the subcontracting market, is not narrowly tailored to address discrimination by the City in the market for prime contracts.

B. *The Amount of the Set-Aside in the Prime Contract Market*

Having decided that the Ordinance is overbroad in its inclusion of subcontracting, we next consider whether the 15 percent goal is narrowly tailored to address discrimination in prime contracting.

The district court found as a fact that, prior to the adoption of Chapter 17-500, the City Council "never attempted to determine the scope of the injury it allegedly sought to remedy with the Ordinance." 893 F. Supp. at 444 n.23. As one of the drafters acknowledged, "there was not sufficient data available to [the] Council that would indicate the number of minority businesses that currently exist[ed] in Philadelphia and within

the surrounding area that would be capable of performing the contracts that the City lets on an annual basis." App. at 4687. As a Councilperson admitted, with admirable candor, in the course of the debate on the 1988 amendment creating a set-aside for the handicapped:

> We didn't do a study to see whether or not ten percent was proper for women or the percentage for minorities was correct. We knew that there were a lot of women out there and a lot of minorities out there and they weren't getting their share. And we set a goal. And it was pretty arbitrary. It was pretty arbitrary.

App. at 5409-10.

The district court also found significant the fact that the preamble to the Ordinance offered only one reference point for the percentages selected for the various set-asides — the percentages of minorities and women in the general population. In addition to the above-quoted legislative findings, the court pointed to the following portions of the legislative history:

> When Bill No. 1477 was introduced on September 16, 1982, the sponsors of the Ordinance stated in the preamble:
>
> > *Goals. Our goals are reasonable and especially so in light of the actual proportion of minorities and females in the local population.*

> (emphasis in original). The sponsors further stated that, in light of the City's 53.65 percent female population and 41.8 percent minority population, the Ordinance's participation goals "reflect a very modest attempt to change what is by any measure a deplorable status quo."

893 F. Supp. at 445 (citations omitted).

Finally, the district court noted that, until it invalidated Chapter 17-500 in 1990, the 15 percent preference for MBEs was shared by an "amalgam of minorities" including Hispanics, American Indians, Aleuts, Eskimos, Asians and Native Hawaiians. *Id.* Since there was no evidence that any of these groups suffered from discrimination, the court concluded that the 15 percent preference for minorities was "not a 'narrowly tailored' remedy for past discrimination." *Id.*[23]

The record supports the district court's findings that the Council's attention at the time of the original enactment and at the time of the subsequent extension was focused solely on the percentage of minorities and women in the general population and that Council made no effort at either time to determine how the Ordinance might be drafted to remedy particular discrimination — to achieve, for example, the approximate market share for black contractors that would have existed, had the purported discrimination not occurred. While the City Council obviously did not tie the 15% participation goal directly to the proportion of minorities in the local population, the goal was either arbitrarily chosen or, at least, the Council's

23. Nor has the City, since 1990, considered whether the 15% goal should be adjusted to reflect the fact that the preference is now for the sole benefit of black contractors.

sole reference point was the minority percentage in the local population.

More importantly, it is equally clear that the City, in the entire course of this litigation, has been unable to provide an evidentiary basis from which to conclude that a 15% set-aside is necessary to remedy discrimination against black contractors in the market for prime contracts. Dr. Brimmer's data indicates that, at most, only 0.7% of the construction firms qualified to perform City-financed prime contracts in the 1979-1981 period were black construction firms.[24] This indicates that the 15 percent figure chosen is an impermissible one.

We do not suggest that the percentage of the preferred group in the universe of qualified contractors is necessarily the ceiling for all set-asides. It well may be that some premium could be justified under some circumstances. It is nevertheless true that the *only* evidentiary basis in this record that appears at all relevant to fashioning a remedy for discrimination in the prime contracting market is Dr. Brimmer's 0.7% figure. That figure does not provide a strong basis in evidence for concluding that a 15% set-aside was necessary to remedy discrimination against black contractors in the prime contract market.

Nor are we able to accept the City's assertion that a 15% set-aside is necessary to provide an effective remedy because of the waiver and exemption provisions of the Ordinance. As the district court found, "very few contractors have ever received waivers of Chapter 17-500's set-aside requirements, and even

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24. Dr. Brimmer testified that there were 57 black construction firms on the OMO Directory and 8050 total construction firms in the Philadelphia SMSA. Dividing 57 by 8050 yields the 0.7% representation of black firms in the Philadelphia construction market.

fewer City contracts have been exempted from the set-aside program." 893 F. Supp. at 444. Indeed, the waivers and exemptions granted from July 1, 1987, to June 30, 1990, constituted less than 2% of the City's public works contracts. The legislative record evidences no expectation on the part of the Council that a material portion of the 15 percent goal chosen would be necessary to offset waivers and exemptions.

C. *Program Alternatives That Are Either Race-Neutral Or Less Burdensome To Non-Minority Contractors.*

In holding that the Richmond plan was not narrowly tailored, the Court in *Croson* considered it significant that race-neutral remedial alternatives were available and that the City had not considered the use of these means to increase minority business participation in City contracting. It noted, in particular, that barriers to entry like capital and bonding requirements could be addressed by a race-neutral program of city financing for small firms and could be expected to lead to greater minority participation. Nevertheless, such alternatives were not pursued or even considered in connection with the Richmond's efforts to remedy past discrimination.

The district court here found that the City's procurement practices created significant barriers to entering the market for City-awarded construction contracts. Small contractors, in particular, were deterred by the City's prequalification and bonding requirements from competing in that market. Relaxation of those requirements, the district court found, was an available race-neutral alternative that would be likely to lead to greater participation by black contractors. No effort was made by the City, however, to identify barriers to entry in its procurement process and that process was not altered before or in conjunction with the adoption of Chapter 17-500.

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The district court also found that the City could have implemented training and financial assistance programs to assist disadvantaged contractors of all races. As an example of the efficacy of such a program, it pointed to the Philadelphia Urban Coalition's Minority Contractors Training and Assistance Program implemented in 1970 by the Urban Coalition. This program was designed to train minority contractors and help them obtain financing and bonding so that they could proceed "from one level to the next in the construction industry." 893 F. Supp. at 441. The record established that this program had achieved substantial success in fulfilling its goals. The district court found, however, that the City had not supported this program and had not considered emulating and/or expanding this program in conjunction with the adoption of the Ordinance.[25] *Id.* at 442.

In 1980, the City did establish the OMO to certify the credentials of minority contractors who were seeking construction opportunities from the UMTA, a federally- funded project to build the Center City Commuter Rail Tunnel and the Airport High Speed Line. The OMO would conduct an investigation of a minority contractor and certify that it was minority owned. Although not required by the UMTA to do so, the OMO also scrutinized the qualifications of the MBE to ensure that it was capable of performing projects of the complexity and size involved with the UMTA. During fiscal 1982, the OMO succeeded in obtaining 20 to 25 construction

25. As mentioned, *supra*, the City alleged that when it considered the Ordinance, it also weighed the effectiveness of the Philadelphia Plan as a race-neutral alternative. All the record indicates is that such a plan was initiated in the 1960s and may have involved the hiring of minorities on construction sites. While the scope and experience of the Philadelphia Plan is not clear, it does not appear to have been addressed to discrimination in the award of construction contracts.

contracts worth $50 million for certified MBEs. The district court found that despite this success the City abandoned the "OMO's strict, but valuable, certification procedures when Chapter 17-500 was enacted in November 1982." *Id.* at 443 n.21. While we recognize that the federal set-aside played a very important role in the OMO achieving the level of minority participation that it did in the UMEA program in 1982, this does not undermine the district court's conclusion regarding the value of a list of minority contractors with certified credentials.

The record provides ample support for the finding of the district court that alternatives to race-based preferences were available in November of 1982 which would have been either race neutral or, at least, less burdensome to non-minority contractors. The City could have lowered administrative barriers to entry, instituted a training and financial assistance program, and carried forward the OMO's certification of minority contractor qualifications. The record likewise provides ample support for the court's conclusion that the "City Council was not interested in considering race-neutral measures, and it did not do so." [26] *Id.* at 442. To the extent the City failed to consider

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26. The legislative history of the Ordinance is generally devoid of any consideration of race-neutral alternatives. Joseph Coleman was a Councilmember when the Ordinance was passed, and was the only such Councilmember to testify. He could testify only that he had been aware of the Philadelphia Plan and Urban Coalition program and could not recall any details of them. The only reference in the legislative history to race-neutral measures was a reference in the preamble to the failure of the federal Small Business Administration to increase the number of minority and women businesses. Examining the success or failure of a national program directed to businesses of all types, however, is not constitutionally adequate consideration of the potential effectiveness of race-neutral measures for a

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or adopt these alternatives, it failed to narrowly tailor its remedy to prior or existing discrimination against black contractors.

We find it particularly noteworthy that Chapter 17-500, since its extension, in 1987, for an additional 12 years, has been targeted exclusively toward benefiting only minority and women contractors "whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." Phila. Code § 17-501(11). The City's failure to consider a race-neutral program designed to encourage investment in and/or credit extension to small contractors or minority contractors seems particularly telling in light of the limited classification of victims of discrimination that Chapter 17-500 seeks to favor.

VIII.

In 1982, the Council of the City of Philadelphia passed an affirmative action program with nothing more than "a generalized assertion that there has been past discrimination in [the] entire [construction] industry." *Croson*, 488 U.S. at 498. At the time it enacted the program, and five years later when it extended the program until 1998, nine years past the original sunset date, the Council had no information before it which provided a firm basis for an inference that there had been discrimination by anyone or against any group, much less an inference that the remedy provided by the program was necessary to redress any particular form of discrimination. In 1989, after being challenged in this suit, the Council undertook

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particular industry in a particular locality. *Cf. Croson*, 488 U.S. at 504 (rejecting city's reliance on Congress' determination that discrimination affected construction industry nationally).

a study of whether, prior to the adoption of the program, it had discriminated against women and minorities in the award of City contracts or passively supported such discrimination by others. That study arguably produced a firm basis for believing that the City had discriminated against black contractors in the award of prime contracts. It did not provide a firm basis for believing that any other form of discrimination had occurred.

The City's affirmative action program has been substantially circumscribed by judicial decrees in this case. The preferences for women and non-black minorities have been stricken. Still, however, the remedy provided by the program substantially exceeds the limited justification that the record provides. The program provides race-based preferences for blacks in the market for subcontracts where there is no strong basis in the evidence for concluding that discrimination occurred. It authorizes a 15% set-aside applicable to all prime City contracts for black contractors when there is no basis in the record for believing that such a set-aside of that magnitude is necessary to remedy discrimination by the City in that market. Finally, the City's program fails to include race-neutral or less burdensome remedial steps to encourage and facilitate greater participation of black contractors, measures that the record shows to be available.

A city may adopt race-based preferences only when there is a "strong basis in evidence for its conclusion that [the] remedial action was necessary." *Id.* at 500. Only when such a basis exists is there sufficient assurance that the racial classification is not "merely the product of unthinking stereotypes or a form of racial politics." *Id.* at 510. That assurance is lacking here, and, accordingly, the race-based preferences provided by Chapter 17-500 cannot stand.

The judgment of the district court will be affirmed.[27]

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27. We have considered and found to be without merit the City's challenges to the district court's judgment based upon (1) Judge Bechtle's failure to recuse, (2) the denial of the motion *in limine* to exclude the testimony of John Smith, and (3) the alleged failure to the contractors to establish standing.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 95-1095 and 95-1138

CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, INC.; GENERAL BUILDING CONTRACTORS ASSOCIATION, INC.; ASSOCIATED MASTER PAINTERS & DECORATORS OF PHILADELPHIA, INC.; EMPLOYING BRICKLAYERS ASSOCIATION OF DELAWARE VALLEY, INC.; INTERIOR FINISH CONTRACTORS ASSOCIATION, INC.; MECHANICAL CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, INC.; ROOFING AND SHEET METAL CONTRACTORS ASSOCIATION, INC.; SUB-CONTRACTORS ASSOCIATION OF DELAWARE VALLEY, INC.; NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC.

v.

CITY OF PHILADELPHIA; ELIZABETH REVEAL, AS DIRECTOR OF FINANCE FOR THE CITY OF PHILADELPHIA; CURTIS JONES, JR., AS DIRECTOR OF THE MINORITY BUSINESS ENTERPRISE COUNCIL; UNITED MINORITY ENTERPRISE ASSOCIATES, INC.

City of Philadelphia, Elizabeth Reveal, as Director of Finance for the City of Philadelphia and Curtis Jones, Jr., as Director of the Minority Business Enterprise Council
Appellants in No. 95-1095

United Minority Enterprise Associates, Inc.
Appellant in No. 95-1138

Appendix B

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 89-cv-02737)

Present: Stapleton, Sarokin and Rosenn, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel on December 7, 1995.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered January 11, 1995, be, and the same is hereby affirmed. Costs taxed against appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ [illegible]
Chief Deputy Clerk

Dated: July 31, 1996

APPENDIX C — MEMORANDUM ORDER, FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT PENNSYLVANIA DATED JANUARY 11, 1995

CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, INC., General Building Contractors Association, Inc., Employing Bricklayers Association of Delaware Valley, Inc., and Subcontractors Association of Delaware Valley, Inc., Plaintiffs,

v.

CITY OF PHILADELPHIA, Elizabeth Reveal, as Director of Finance for the City of Philadelphia, and Curtis Jones, Jr., as Director of the Minority Business Enterprise Council, Defendants,

and

United Minority Enterprise Associates, Inc., Intervening Defendant.

No. 89-2737

United States District Court,
E.D. Pennsylvania.

January 11, 1995

* * *

Thomas J. McGoldrick, John H. Widman, John J McAleese, Jr., McAleese, McGoldrick & Susanin, P.c., King of Prussia, PA, for plaintiffs.

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Seymour Kurland, Dechert, Price & Rhoads, Thomas J. Wamser, Deputy City Sol., James P. Cousounis, Luther E. Weaver, Charles W. Bowser, Bowser, Weaver & Cousounis, P.C., A. Michael Pratt, Chief Deputy City Sol., Karen Singletary, Asst. City Sol., Philadelphia, PA, for defendants.

Robert T. Vance, Jr., Vance, Jackson, & Vance-Lewis, Philadelphia, PA, intervenor-defendant.

Carl E. Singley, Philadelphia, PA, for Philadelphia Urban Coalition, Philadelphia Urban League, Minority Enterprise Development Committee.

Charisse R. Lillie, Deputy City Sol., Philadelphia, PA, for Redevelopment Authority of City of Philadelphia.

Charles C. Hileman, Philadelphia, PA, Richard S. Mailman, Wyncote, PA, for James Morrissey, Inc., J.S. McGarvey, Inc.

MEMORANDUM ORDER WITH SUPPORTING FINDINGS OF FACT AND CONCLUSIONS OF LAW

BECHTLE, District Judge.

I. *INTRODUCTION*

This is a facial challenge on constitutional grounds to certain provisions of Chapter 17-500 of the Philadelphia Code ("Chapter 17-500" or "Ordinance"), a City of Philadelphia ("City") ordinance creating preferences, or "set-asides," in City contracting for businesses owned by minorities, women, and handicapped individuals. Presently before court is the need to determine whether the Ordinance's provision creating a

fifteen percent "goal" for black participation in City construction contracting satisfies the strict scrutiny test under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

A nine day non-jury trial was held on this issue between May 31, 1994 and June 20, 1994. Based on the evidence admitted at trial, and the court's findings of fact and conclusions of law as set forth below, the court finds that Chapter 17-500's fifteen percent "goal' for black participation in City construction contracting violates the Equal Protection Clause because it is not "narrowly tailored" to a "compelling government interest." The City is hereby permanently enjoined from enforcing Chapter 17-500's racial preference, and the regulations promulgated thereunder, in the award of City construction contracts.

II. *BACKGROUND*

A. Summary of the Ordinance

On November 4, 1982, the Philadelphia City Council enacted Chapter 17-500 for the declared purpose of increasing City contracting opportunities for businesses owned by minorities and women, and increasing the number of minority and female-owned businesses within the City of Philadelphia.[1] (Joint Ex. 4 at 501-18.) As originally enacted, Chapter 17-500 contained a fifteen percent "goal" for City contract participation by minority-owned business enterprises ("MBEs"), and a ten percent "goal" for City contract participation by woman-owned

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1. A copy of the Ordinance, as amended, was admitted into evidence as Defendants' Exhibit 101.

business enterprises ("WBEs"). Phila.Code § 17-503(l)(a)-(b) (1982). Chapter 17-500 was later amended to expand its coverage to "disadvantaged business enterprises," and to include a two percent "goal" for City contract participation by handicapped-owned business enterprises ("HBEs").[2] Phila.Code § 17-503(1) (1987). The Ordinance currently applies to all City contracts, whether competitively bid or negotiated, for vending, construction, and personal and professional services. Phila.Code §§ 17-501(6) and 17-503(l).

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2. The Ordinance defines a "Disadvantaged Business Enterprise" as any small business which is at least 51 percent owned by one or more "socially and economically disadvantaged individuals" or, in the case of public corporations, one in which at least 51 percent of the stock is owned by one or more "socially and economically disadvantaged individuals." Phila.Code § 17-501(10).

"Socially and Economically Disadvantaged Individuals" are defined as:

> those individuals who have either been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their disability without regard to their individual qualities, and whose ability to compete in the free enterprise system has been imparied due to diminished capital and credit opportunities as compared to others in the same business who are not socially disadvantaged.

Phila.Code § 17-501(11).

All minorities, women and disabled individuals are rebuttably presumed to be "socially and economically disadvantaged individuals." Phila.Code § 17-501(11)(a).

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Chapter 17-500 created an agency known as the Minority Business Enterprise Council ("MBEC") to administer the Ordinance and ensure that its "goals" for minority and female participation are met by both City agencies and prime contractors doing business with the City. Phila.Code § 17-504. Pursuant to § 17-504(2), the MBEC has promulgated regulations for the implementation of Chapter 17-500, and it has certified contractors as eligible to participate in the setaside program. The MBEC continues to monitor compliance with the Ordinance, and it issues reports to City officials on the effectiveness of the set-aside program.

B. ***Summary of the Case and Trial***

On April 14, 1989, nine incorporated associations of construction contractors ("contractors") brought suit against the City and various City officials (collectively "City"), pursuant to 42 U.S.C. § 1983, challenging the constitutional validity of Chapter 17-500 and the MBEC regulations under the Equal Protection Clause of the Fourteenth Amendment. The contractors allege, among other things, that the City's use of race-based measures to promote City contracting opportunities for minorities violates the Fourteenth Amendment's guarantee of equal treatment to all persons.

Under the Fourteenth Amendment's guarantee of equal protection of the laws to all persons, classifications based on race are highly suspect. *City of Richmond v. J.A Croson Co.*, 488 U.S. 469, 493-98, 109 S.Ct. 706, 721-24, 102 L.Ed.2d 854 (1989). In certain circumstances, local governments have the authority to eradicate the effects of racial discrimination within their legislative jurisdiction; however, this authority must

be exercised within the constraints of the Fourteenth Amendment. *Croson*, 488 U.S. at 491-93, 109 S.Ct. at 720-21. A local government may implement race-conscious legislation if the legislation is necessary to redress clear instances of past discrimination and it is narrowly tailored to achieve this goal. *Id.* As the Supreme Court stated in *Croson:*

> [b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate.

Id. at 505, 109 S.Ct. at 727-28. (citation omitted). Moreover, even if the local government specifically identifies the discrimination that it seeks to remedy, narrowly drawn racial classifications may only be used as a last resort. *Id.* at 519, 109 S.Ct. at 735.

Once a challenge to race-conscious legislation has been raised, that party bears the ultimate burden of proving that the legislation is unconstitutional. *Contractors Ass'n of Eastern Pennsylvania, Inc. v. Philadelphia*, 6 F.3d 990, 1005 (3d Cir. 1993). The local government, in resisting such a challenge, must show a "strong basis in evidence" to support its racial classifications. *Croson*, 488 U.S. at 492, 499-500, 109 S.Ct. at 721, 724-25. The proponent of the legislation must demonstrate that there were actual instances of past discrimination; that the MBE plan is necessary to remedy the discrimination; and that the plan is narrowly tailored to that goal. *Id.* at 491-93, 109

S.Ct. at 720-21. The legislation then must be subjected to searching judicial inquiry under the strict scrutiny standard to determine whether the legislation's race-based measures are "benign" or "remedial," or whether the legislation's racial classifications "are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id.* at 493, 109 S.Ct. at 721. As the Supreme Court stated in *Croson:*

> the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Id.

This court has twice granted summary judgment in favor of the plaintiffs because the City failed to produce, in a summary judgment format, sufficient evidence of past discrimination in the Philadelphia construction industry to satisfy the strict scrutiny test. *See Contractors Ass'n of Eastern Pennsylvania, Inc. v. Philadelphia,* 735 F.Supp. 1274 (E.D.Pa.1990); *Contractors Ass'n of Eastern Pennsylvania, Inc. v. Philadelphia,* Civ. No. 89-2737, 1992 WL 245851 (E.D.Pa. Sept. 22, 1992).

On appeal, the Third Circuit agreed with this court's finding that the anecdotal and statistical evidence considered by the Philadelphia City Council in 1982 did not provide a sufficient

evidentiary basis for Chapter 17-500 to withstand strict scrutiny. *Contractors Ass'n of Eastern Pennsylvania, Inc. v. Philadelphia*, 6 F.3d 990, 1002-03 (3d Cir. 1993). The Third Circuit, however, found that the City's post-enactment statistical evidence—specifically, a "disparity index" calculated by the City's expert witness, Dr. Andrew F. Brimmer ("Dr. Brimmer")—established a *prima facie* case of racial discrimination in the award of City construction contracts that was sufficient for the City to withstand summary judgment. *Contractors*, 6 F.3d at 1007. The Third Circuit held:

> the City's statistical evidence has created an inference of discrimination which the Contractors would have to rebut at trial either by proving a "neutral explanation" for the disparity, "showing the statistics are flawed, . . . demonstrating that the disparities shown by the statistics are not significant or actionable, . . . or presenting contrasting statistical data."

Id. (*quoting Coral Constr. Co. v. King County*, 941 F.2d 910, 921 (9th Cir.1991), *cert. denied*, 502 U.S. 1033, 112 S.Ct. 875, 116 L.Ed.2d 780 (1992)). The Third Circuit remanded the case to this Court for trial to determine whether Chapter 17-500's fifteen percent "goal" for black participation in City construction contracting is justified by a "compelling government interest," and, if so, whether it is "narrowly tailored" to remedy specifically identified instances of past discrimination. *Contractors*, 6 F.3d at 1012.

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During the trial, the contractors presented the testimony of two witnesses, and over 100 exhibits, to demonstrate that there is no compelling government interest supporting the Ordinance in that discrimination did not exist in the Philadelphia construction industry before the enactment of Chapter 17-500, or since, and Chapter 17-500's racial preference nevertheless denies City contracting opportunities to non-minority contractors solely on the basis of race. In accordance with the articulation by the Third Circuit of the issues to be addressed on remand, the contractors presented the testimony of Dr. George R. LaNoue ("Dr. LaNoue") to demonstrate that Dr. Brimmer's disparity study is scientifically and methodologically flawed. The contractors also presented the testimony of John Smith ("Smith"), General Manager of the Contractors Association of Eastern Pennsylvania, Inc. ("CAEP") and former member of the MBEC, to support their position that racial discrimination did not exist in the Philadelphia construction industry, and that non-minority contractors have been denied the opportunity to participate in a certain percentage of City construction contracts solely because of their race.

In response to the contractors' proof, the City offered the testimony of Dr. Brimmer, and various proponents of the set-aside legislation, to support the City's position that Chapter 17-500's fifteen percent "goal" for minorities is nondiscriminatory because the City had a "compelling government interest" in remedying the effects of past racial discrimination in the Philadelphia construction industry, and that Chapter 17-500 is "narrowly tailored" to achieve this goal. In addition, intervening defendant, United Minority Enterprise Associates, Inc. ("UMEA"), presented the testimony of two minority contractors to demonstrate the positive effect that Chapter 17-500 has had on the Philadelphia construction industry.

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After carefully considering all of the evidence submitted at trial, as well as the submissions of the parties in support of their respective positions, the court makes the following findings of fact and conclusions of law.

III. *FINDINGS OF FACT*

A. The Parties, Jurisdiction and Venue

1. Plaintiffs, CAEP; General Building Contractors Association, Inc. ("GBCA"); Employing Bricklayers Association of Delaware Valley, Inc. ("EBA"); and Subcontractors Association of Delaware Valley, Inc. ("SADV"); are four incorporated associations of construction contractors located in the Philadelphia Standard Metropolitan Statistical Area ("Philadelphia SMSA").[3] The individual members of the contractors associations have participated in the past, and continue to participate, as general contractors or subcontractors on city public works projects.

2. Defendant, the City of Philadelphia, is a city of the first class organized and operated in accordance with Title 53, Chapter 44, of the Pennsylvania Statutes Annotated, and the Philadelphia Home Rule Charter.

3. Defendant Elizabeth Reveal is a former Director of Finance for the City. As Director of Finance, she was

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3. The Philadelphia SMSA consists of eight counties in the Philadelphia geographic area: Philadelphia County, Montgomery County, Chester County, Delaware County and Bucks County in Pennsylvania; and Gloucester County, Burlington County and Camden County in New Jersey. (Defs.' Ex. 22 at D-6.)

responsible for the administration of the City Procurement Department, including the administration of the MBEC.

4. Defendant Curtis Jones, Jr. is a former Director of the MBEC.

5. Intervening defendant UMEA is an organization which represents the interests of minority-owned businesses in the Philadelphia area.

6. The court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3) and (4).

7. Venue is proper pursuant to 28 U.S.C. § 1391(b).

B. *The Plaintiffs Have Demonstrated that Non-Minority Contractors Have Been Denied City Construction Contracts on the Basis of Race*

8. The contractors have standing to challenge the constitutionality of Chapter 17-500's fifteen percent "goal" for minority participation in City construction contracts because they have demonstrated that they are "able and ready to bid on contracts [subject to the ordinance] and that a discriminatory policy prevents [them] from doing so on an equal basis." *See Contractors*, 6 F.3d at 995-96 (*quoting Northeastern Fla. Chapter of the Associated Gen. Contractors of America v. Jacksonville*, __ U.S. __, __, 113 S.Ct. 2297, 2303, 124 L.Ed.2d 586 (1993)).

9. Members of the CAEP perform a variety of "heavy and highway" construction projects, including the building of bridges, streets and highways, utility plants, water plants and

railroads. (Smith, Tr. 5/31/94 at 31-33.) Most of these projects are let by public bodies, including the City of Philadelphia. (*Id.* at 33-34.)

10. From the 1970s until today, 85 to 90 percent of CAEP members have performed between 30 and 100 percent of the public works projects awarded in the five county Philadelphia area, which is included in the Philadelphia SMSA.[4] (*Id.* at 35-38.) In 1982, CAEP members performed 80 percent of the public works projects in the five county Philadelphia area. (*Id.* at 38.)

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4. The court finds that the eight county Philadelphia SMSA is the relevant geographic area for the purpose of the court's inquiry. The court makes this finding for three reasons: First, the City's declared purpose for enacting Chapter 17-500 was to remedy racial discrimination in the Philadelphia metropolitan area. (Joint Ex. 4 at 501-18.)

Second, in fiscal year 1982 (the fiscal year before Chapter 17-500 was enacted) the Procurement Department analyzed City contract information to determine the geographic location of successful bidders, amounts awarded, and the percentage of "sole source" contracts. As a result of this study, the Procurement Department found that 75 percent of City contracts and contract dollars were awarded to firms in the five county Philadelphia area. (Pls.' Ex. 12 at 19.) An additional 12 percent of City contracts and contract dollars were awarded to firms in New Jersey. (*Id.* at 20.) However, less than one percent of City contracts and contract dollars were awarded to firms in Delaware. (*Id.* at 20.) Similarly, Pennsylvania firms located outside the five county Philadelphia area received less than three percent of City contracts. (*Id.*).

Finally, expanding the relevant georgraphic area beyond the Philadelphia SMSA distorts the court's inquiry because it would unneccessarily expand the number of potentially available contractors of all races without any corresponding evidence that those additional contractors were qualified, willing and able to perform City contracts, or that black contractors located outside the Philadelphia SMSA were discriminated against in the award of City contracts.

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11. In the late 1970s, CAEP members would submit up to 100 bids a year to the City for public works projects. (*Id.* at 60.) Much of this work was performed by the contractors' own work forces, an individual contractor usually would not subcontract a portion of a job unless special skills were required to complete that portion. (*Id.* at 77-79.)

12. With the passage of Chapter 17-500 in 1982, non-minority construction contractors were immediately denied the opportunity to compete for fifteen percent of City contract dollars solely on the basis of race. The contractors have proven that they were able and ready to bid on this protected segment of City construction contracts but could not do so for failure to meet Chapter 17-500's race-based participation requirement.[5]

13. Based on the evidence of record, the contractors have established a *prima facie* case of denial of equal protection because the City, under Chapter 17-500, uses a race-based classification as the basis for the award of City construction contracts.

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5. With the passage of Chapter 17-500, non-minority contractors were forced to engage in "creative subcontracting" to meet the MBE participation requirement of the Ordinance. (Smith, Tr. 5/31/94 at 77-79.) In other words, the non-minority contractor would be forced to break a project that he was otherwise capable of performing into subparts, and then subcontract at least fifteen percent of the project to a minority, in order to satisfy the MBE participation requirement of Chapter 17-500. (*Id.*)

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C. *The City Has Not Demonstrated a "Compelling Government Interest" to Justify Chapter 17-500's Racial Preference in Construction Contracts*

14. The City contends that it had a "compelling government interest" in implementing Chapter 17-500's racial classifications because pervasive racial discrimination existed in the Philadelphia construction industry prior to the enactment of the Ordinance. To support this argument, the City contends that, during the three years immediately preceding the enactment of Chapter 17-500, a significant statistical disparity existed between the number of available black contractors in the Philadelphia construction industry and the dollar value of the City construction contracts awarded to these contractors. The City also contends that it acted as a "passive participant" in racial discrimination by supporting discriminatory contractors with City tax dollars. Finally, the City argues that very few black construction contractors were members of the contractors associations because they were excluded on the basis of race.

1. *Statistical Disparity*

15. During the course of this litigation, the City retained Dr. Brimmer to determine, among other things, whether black contractors were denied their proportionate share of City construction contracts because of racial discrimination.[6] (Defs.'

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6. Dr. Brimmer is the President of Brimmer & Company, Inc., a financial and economic consulting firm located in Washington, D.C. (Defs.' Ex. 6 at ¶ 1.) Brimmer & Company conducts research and advises clients concerning, among other things, trends in economic activity and prospects. (*Id.* at ¶ 2). Brimmer & Company has consulted on three studies of statistical disparties and discrimination in local markets on behalf of the cities of Atlanta, Georgia; Dade County, Florida; and St. Louis, Missouri. (*Id.* at ¶ 10.)

Ex. 6 at ¶ 11.) Dr. Brimmer purportedly examined statistical, historical and anecdotal evidence relating to participation of MBEs in the construction industry in the Philadelphia metropolitan area, both in the public and private sectors. *(Id.)* Dr. Brimmer's goal was to determine whether MBEs have suffered disparate treatment in bidding and awards for construction contracts let by the City, or by private owners, and, if so, to appraise whether such statistical disparities reflected past or present discrimination. (*Id.*)

16. Dr. Brimmer's "disparity study" entailed a review of the following information: (1) the federal government's 1982 Census of Construction Industries, including the Philadelphia construction industry; (2) a directory and one-page summary of MBEs in the Philadelphia area in 1982, prepared by the City (the "Pre-MBEC Directory"); and (3) a report that the City submitted to the U.S. Congress, House of Representatives, Committee on Small Business, in March 1982, which contained the total dollar value of City-financed prime contracts awarded to minorities in fiscal years 1979, 1980 and 1981. *(Id.* at ¶ 14.)

17. Based solely on his review of the foregoing information, Dr. Brimmer concluded:

> We have found a substantial statistical disparity in the participation of MBEs in the City of Philadelphia Public Works contracts for fiscal years 1979 to 1981, when compared to their availability in that market, from which we conclude that the disparity is attributable to racial discrimination.

(*Id.* at ¶ 13.)

18. Dr. Brimmer's conclusion that the statistical disparity is attributable to racial discrimination is based on his application of a "disparity index." (*Id.* at ¶ 15.) Dr. Brimmer calculated this "disparity index" by "dividing the percentage participation in dollars of minority groups in the public works contracts awarded by the City of Philadelphia by their percentage availability or composition in the 'population' of Philadelphia area construction firms and multiplying the result by 100." *(Id.)*

19. According to Dr. Brimmer:

> As participation approaches availability, the disparity index approaches 100, and therefore fully equitable participation would achieve an index of 100, whereas complete exclusion would produce a score of 0. Thus, the nearer the measure is to 0 or the lower the value of the disparity index, the greater the extent of racial disparity and the stronger the inference of discrimination. An index of 0 demonstrates discriminatory exclusion.

(*Id.* at ¶ 16.)

20. Dr. Brimmer measured the participation of minorities in City contracting, or the numerator of his disparity equation, by examining the total value of prime contracts awarded to minorities in fiscal years 1979, 1980 and 1981. (*Id.* at ¶ 18.) Dr. Brimmer divided the dollar value of the five city-financed prime contracts awarded to MBEs in fiscal years 1979, 1980 and 1981 ($667,501.00) by the total amount of all public works contracts awarded by the City ($419,779,641.00), and determined a "participation rate" of 0.1%. *(Id.)*

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21. Dr. Brimmer measured the availability of minority contractors in the Philadelphia metropolitan area in 1982, or the denominator of his disparity equation, by dividing the City-supplied figure of 195 available MBEs in the Philadelphia SMSA in 1982, by the federal census figure of 8050 construction firms with employees in the Philadelphia SMSA at at time. (*Id.* at ¶ 19.) This calculation yielded an "availability rate" of 2.4%. *(Id.)*

22. Dr. Brimmer calculated his "disparity index" by dividing the participation rate (0.1%) by the availability rate (2.4%), and multiplying that value (0.04) by 100. (*Id.* at ¶ 20.) This calculation yielded a disparity index of 4, from which Dr. Brimmer concluded "a disparity index of 4 produces a strong inference of racial discrimination because of its proximity to 0 which represents total exclusion." (*Id.* at ¶ 21.)

23. Because no public works contracts were awarded to MBEs in fiscal year 1981, Dr. Brimmer calculated a disparity index of 0 for that year. (*Id.* at ¶ 124.) Dr. Brimmer concluded "a disparity index of 0 represents the purest indicator of discriminatory exclusion." *(Id.)*

24. Dr. Brimmer next examined the proportion of MBE participation in private contracting after the enactment of Chapter 17-500. Based on Dr. Brimmer's review of data compiled by the City's attorneys regarding the amount of MBE participation in privately-funded projects from 1982 through 1987, and the Procurement Department's annual reports of MBE participation in the set-aside program during fiscal years 1985 through 1992, Dr. Brimmer concluded "MBEs . . . had a disproportionately low participation rate in the private sector construction market and this disparate-participation demonstrates racial . . . discrimination." (*Id.* at ¶ 31.)

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25. Because of insufficient data, Dr. Brimmer was unable to calculate a complete disparity index for MBE participation in the private sector construction market. (*Id.* at ¶ 32.) Dr. Brimmer, however, calculated a MBE and WBE participation rate of 2.1% based on information obtained from the results of a mail-in survey of Philadelphia area contractors. (*Id.*) Based on this calculation, and its comparison to much higher MBE and WBE participation rates in public works contracts during fiscal years 1985 through 1989, Dr. Brimmer concluded "the low participation rate of 2.1 in the private contracting sphere during 1982 through 1987 demonstrates disparate treatment, and we can identify no other reason for such disparate treatment but racial and gender discrimination." [7] (*Id.* at ¶ 37.)

26. Dr. Brimmer next compared the membership requirements of the four contractors' associations that are parties to this lawsuit to a City official's tabulation of the number of MBEs who are members of these organizations, and determined that MBEs had a disproportionately low statistical representation in these organizations which could only be explained by racial discrimination. (*Id.* at ¶ 38.) Without examining any other evidence, Dr. Brimmer concluded "[t]hese statistics demonstrate that the associations either totally excluded MBEs . . . or limited their participation to token levels." (*Id.* at ¶ 39.)

27. After the Third Circuit narrowed this court's inquiry

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7. According to Dr. Brimmer, MBE participation in City contracting for fiscal years 1985 through 1989 was as follows: 1985, 17.04 percent; 1986 15.54 percent; 1987, 16.67 percent; 1988, 15.44 percent; and 1989, 19.59 percent. (Defs.' Ex. 6 at ¶ 34.) Dr. Brimmer also stated that in fiscal year 1991, after the court enjoined the City from enforcing the set-asides in Chapter 17-500, MBE participation in City contracting fell to 5.06 percent. (*Id.* at ¶ 35.)

to determine whether discrimination was practiced against blacks, Dr. Brimmer calculated a series of "alternative disparity ratios" to measure the City's utilization of black construction contractors. Using 1982 federal census data instead of City-supplied figures to compute availability, Dr. Brimmer calculated a disparity index of 37 for City utilization of black-owned construction companies with employees. (Defs.' Ex. 7 at 10, 15.) Dr. Brimmer also recalculated his original disparity ratio to reflect the City's usage of black-owned construction companies. Using a new City-supplied figure of 114 for availability, Dr. Brimmer calculated a disparity index of 11.4. *(Id.)*

28. Finally, Dr. Brimmer concluded that Chapter 17-500's fifteen percent set-aside for black-owned construction companies is narrowly tailored because it provides an incentive for black contractors to "respond vigorously" to cure racial disparities, and because it reflects the need to take into account waivers and exemptions granted because of insufficient MBEs available to perform certain contracts. (*Id.* at 10-11.)

a. ***Dr. Brimmer's Conclusions are Legally Insufficient***

29. Dr. Brimmer has conceded that a statistical disparity, standing alone, is not dispositive of racial discrimination. (Brimmer, Tr. 6/9/94 at 167-68; Tr. 6/10/94 at 112.) Moreover, in *Croson*, the Supreme Court defined the limits of a statistical disparity by stating "[w]here there is a significant statistical disparity . . . an inference of discriminatory exclusion *could* arise." *Croson*, 488 U.S. at 509, 109 S.Ct. at 730 (emphasis supplied) (citations omitted). To establish racial discrimination, the statistical disparity must in some way be linked to additional evidence. Otherwise, an inference of discriminatory exclusion

simply cannot be conclusive. *See O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 426 (D.C.Cir.1992) ("The idea that discrimination caused the low percentage [of minority participation] is nothing more than a hypothesis . . .").

30. Dr. Brimmer contends that the testimony of minority contractors before the City Council Committee on Finance in 1982 supports his opinion that racial discrimination existed in the Philadelphia construction industry. (Defs.' Ex. 6 at ¶ 28; Brimmer, Tr. 6/9/94 at 145-54.) However, both this court and the Third Circuit have already held that the anecdotal and statistical evidence considered by City Council in 1982 does not provide a sufficient evidentiary basis for the racial preference in Chapter 17-500 to withstand strict scrutiny. *See Contractors*, 735 F.Supp. at 1295-98; Contractors, 6 F.3d at 1002-03. Therefore, Dr. Brimmer's conclusion on this basis is legally insufficient.

31. Dr. Brimmer also contends that historical discrimination against blacks in local trade unions has limited opportunities for blacks to participate as entrepreneurs in the Philadelphia construction industry. (Defs.' Ex. 6 at ¶¶ 29-30; Brimmer, Tr. 6/9/94 at 105-37.) According to Dr. Brimmer:

> The typical construction firm is owned and operated by a person who has "come up" through the industry. Initial entry is via *apprenticeship* programs and *on-the* [sic] *job training. Trade Union membership* is a vital element which can facilitate or restrain advancement in the industry. Progress is from *craftsman to supervisor/foreman.* Discrimination has had a seriously adverse

> effect on blacks' ability to enter and advance through industry ranks.

(Defs.' Ex. 7 at 2) (emphasis in original).

32. To support this conclusion, Dr. Brimmer points to a study of black membership in local trade unions conducted by the City's Commission on Human Relations in 1963. (*Id.* at 3.) The Commission's study concluded that five local unions had "followed customs and practices . . . which have inevitably resulted in the exclusion of non-whites from the particular trades." (*Id.*) Dr. Brimmer believes that discrimination in trade unions in 1963 had an adverse impact on the availability and qualifications of black construction contractors twenty years later in 1982. (*Id.* at 3-4 and 6-7.) According to Dr. Brimmer, exclusion from the unions in the 1960s meant that black contractors were unable to obtain the skills necessary to compete on an equal basis with white contractors for large City public works contracts in the 1980s. (*Id.*).

33. It is unadorned speculation how many qualified black contractors would now be engaged in the Philadelphia construction industry absent discrimination in trade unions in 1963 and thereafter. There is no evidence in the record to support Dr. Brimmer's conclusions, and his theory cannot be used to justify the enactment of a highly suspect racial classification. See *Croson*, 488 U.S. at 498-99, 109 S.Ct. at 724.

34. Dr. Brimmer's theory about trade union discrimination is identical to the argument that Richmond, Virginia used in its attempt to justify the set-aside in *Croson*. *Id.* at 498, 109 S.Ct. at 724. This argument, however, was unhesitating rejected by Justice O'Connor in what is undoubtedly one of the most strongly worded passages of the Supreme Court's opinion:

> While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia. Like the claim that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.
>
> It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination, just as it is sheer speculation how many minority medical students would have been admitted to the medical school at Davis absent past discrimination in educational opportunities. Defining these sorts of injuries as "identified discrimination" would give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor.

Id. at 499, 109 S.Ct. at 724-25.

35. In sum, Dr. Brimmer's conclusion that racial discrimination existed in the Philadelphia construction industry

is legally flawed, because it rests upon assumptions that are insufficient to withstand strict scrutiny.

b. ***There is a "Neutral Explanation" for Dr. Brimmer's Disparities***

36. Dr. Brimmer contends that a substantial statistical disparity exists between the participation of MBEs in the City public works contracts for fiscal years 1979 to 1981, when compared to their availability in the construction industry, from which he concludes that the disparity is attributable to racial discrimination. There are, however, several neutral explanations for Dr. Brimmer's statistical disparities.

37. When Dr. Brimmer calculated his disparity indexes of 4 for MBE participation in City-financed prime construction contracts during fiscal years 1979, 1980 and 1981; 37 for City utilization of black-owned construction companies with employees during this period; and 11.4 for City utilization of construction companies owned by black men; Dr. Brimmer assumed that all black and non-black contractors were equally qualified, able and willing to perform City-financed public works contracts. Dr. Brimmer never considered how many black contractors *actually* sought to participate in City-financed prime construction contracting.

38. During fiscal years 1979 to 1981, only seven black contractors sought to prequalify to bid on City-financed prime construction contracts. (*See* Pls.' Ex. 60; Defs.' Ex. 102.) Four of these seven black contractors obtained prequalffication. (*Id.*) The City ultimately awarded five city-financed prime contract,

totalling $667,501.00 to MBEs in fiscal years 1979 to 1981.[8] (Defs.' Ex. 107.) In addition, the City awarded another $689,528.00 in public works contracts to minority contractors between July 1, 1981 and June 30, 1982. (Pls.' Ex. 12 at 24.)

39. According to the City's records, in 1982 there were only 59 black contractors in the Philadelphia SMSA who were certified by the City's Office of Minority Opportunity. ("OMO") as qualified to perform City public works contracts.[9] (Defs.' Ex. 17; Defs.' Ex. 18.) During fiscal years 1979 to 1981, many of these black contractors were heavily participating in federally-assisted public works projects, such as the construction of the Market East Train Station, the Center City Commuter Rail Connection, and the Airport High Speed Line.[10] (Pls.' Ex. 16.) During this period, black contractors received more than $50 million in federally-assisted public works contracts, which were also let by the City Procurement department. (Robinson, Tr. 6/8/94 at 78.)

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8. In Fiscal Year 1979, three public works contracts totalling $129,001.00 were awarded to minorities acting as prime contractors. (Defs.' Ex. 107.) In Fiscal Year 1980, two public works contracts totalling $538,500.00 were awarded to minorities acting as prime contractors. (*Id.*) No public works contracts were awarded to minorities acting as prime contractors in Fiscal Year 1981. (*Id.*)

9. OMO certification did not mean that black contractors could bypass the Procurement Department's prequalification requirements; it simply meant that an OMO-certified black contractor had a proven track record of performing city contracts. (*See, e.g.*, Robinson, Tr. 6/8/94 at 8-32.)

10. For a more thorough discussion of black participation in federally-assisted public works contracts, see subsection 1-d, *infra*.

40. None of this information is reflected in Dr. Brimmer's disparity study. Given the sparse participation of blacks in City-financed construction contracts during this period, it is not surprising that a disparity exists between their availability and their participation in this one area of the construction industry. However, when consideration is given to the low number of available, qualified black contractors at this time, and their high level of participation in federally-assisted public works contracts during the same period, it becomes obvious that the disparities measured by Dr. Brimmer are not attributable to racial discrimination in the Philadelphia construction industry.

c. ***Dr. Brimmer's Study is Methodologically Flawed***

41. In accordance with the Third Circuit's holdings in *Contractors*, the plaintiffs retained Dr. George R. LaNoue ("Dr. LaNoue") to analyze Dr. Brimmer's report, and the data upon which he based his conclusions, to determine whether Dr. Brimmer's study conformed with the standards set forth in *Croson.*[11]

42. On March 22, 1994, Dr. LaNoue issued a report citing substantial flaws in Dr. Brimmer's data and methodology which, in his view, precluded Dr. Brimmer, and the court, from

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11. Dr. LaNoue is the Director of the Project on Civil Rights and Public Contracts at the University of Maryland in Baltimore. (Pls.' Ex. 2 at 1-3.) He is also a Professor of Political Science at the University and the Director of its Policy Sciences Graduate Program. (*Id.*) Dr. LaNoue has written four books and dozens of articles on issues of public policy and law. (*Id.*) Recently, his research has focused on the appropriate legal and social science standards for post-*Croson* disparity studies. (*Id.*) One of his books, the *Local Officials Guide to Minority Business Programs and Disparity Studies: Responding to the Supreme Court's Mandate in City of Richmond v. Croson,* National League of Cities (1994), was admitted into evidence as Plaintiffs' Exhibit 3.

reasonably inferring that black contractors were discriminated against in City contracting. (Pls.' Ex. 2.) According to Dr. LaNoue, Dr. Brimmer's study is flawed both as to his scientific approach as well as to his methodology. (*Id.*)

43. Dr. LaNoue criticized Dr. Brimmer's methodology and conclusions because he:

(a) never made any independent assessment of the number of black and non-black construction firms in the Philadelphia area who were qualified, willing and able to perform City contracts, but instead based his calculations for the disparity ratios on mere headcounts of firms;

(b) improperly mixed data from different sources when calculating the disparity ratios;

(c) relied on the City's figures regarding available MBEs without testing them to see if they were correct;

(d) relied too heavily on census data, which merely indicates the existence of firms but does not indicate their qualifications, willingness, or availability to participate in City contracting;

(e) assumed that all MBEs who were available were also qualified and willing to perform City public works contracts, without testing this assumption by examining the number of MBEs who sought or obtained prequalification for, or actually bid on, City contracts;

(f) never considered the amount of MBE participation in federally-assisted construction projects which were also let by the City Procurement Department;

(g) never considered the services procured, or contracts let, by the City to determine the City's needs;

(h) never considered the specializations of MBEs to determine whether they could fulfill the City's needs;

(i) never made any attempt to verify the accuracy of the anecdotal evidence presented to City Council, nor did he attempt to gather additional anecdotal evidence of racial discrimination;

(j) relied on the City's assertion that MBEs did not participate as subcontractors on any City public works projects let in 1979, 1980 and 1981, without determining whether this statement was accurate; and

(k) never tested any alternative explanations for a disparity and, therefore, could not conclude with any certainty what caused a disparity. (*Id.* at 5-41.)

44. Dr. LaNoue compared Dr. Brimmer's Philadelphia disparity study to studies that Dr. Brimmer prepared for other municipalities and found that the Philadelphia study was far less comprehensive and based on statistical evidence that Dr. Brimmer had previously rejected as statistically insignificant. (*Id.* at 5, 36-37.) For example, in the Philadelphia study, Dr. Brimmer based his conclusion that racial discrimination existed in the private construction market on his review of survey answers provided by non-MBE contractors. However, the return rate for the Philadelphia surveys, 0.32 percent, was far below a 15 percent return rate that Dr. Brimmer rejected as statistically insignificant when he conducted a similar disparity study in Dade County, Florida. (*Id.* at 36-37.)

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45. Based upon his examination of Dr. Brimmer's methodology, his comparison of Dr. Brimmer's Philadelphia study to disparity studies conducted by Dr. Brimmer in other municipalities, and his knowledge of post *Croson* disparity studies in general, Dr. LaNoue concluded that Dr. Brimmer's Philadelphia disparity study was not consistent with either the legal test set forth in *Croson* or established principles of social science. (*Id.* at 38-42.)

46. After carefully examining the record, including the testimony of both expert witnesses at trial, the court finds that Dr. LaNoue's conclusions are correct.

47. In *Croson,* Justice O'Connor stated that a municipality may enact race-based remedial measures if there is "a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality's prime contractors . . ." *Croson,* 488 U.S. at 509, 109 S.Ct. at 730. "Qualified," "willing" and "able" are the three pillars of the *Croson* test; a *fortiori,* a municipality may not enact race-based remedial measures unless it determines that qualified, willing and able minority contractors have been excluded from participating in public contracting.

48. Dr. Brimmer never attempted to measure whether qualified, willing and able black contractors were excluded from participating in Philadelphia public contracting. Instead, Dr. Brimmer simply assumed that every black contractor who was available was equally qualified, willing and able to perform City public works contracts. Dr. Brimmer's assumption, however, is not supported by the evidence.

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49. First, Dr. Brimmer does not know, with any degree of certainty, how many black contractors were available to perform City public works contracts in 1982. In his 1994 supplemental report, Dr. Brimmer opined that there were 114 black-owned construction companies in the Philadelphia SMSA in 1982. (Defs.' Ex. 7 at 10, 15.) During the trial, however, Dr. Brimmer acknowledged that his availability figure of 114 black-owned construction companies was inaccurate because it included black firms located outside of the Philadelphia SMSA, and black firms that were not construction contractors. (Brimmer, Tr. 6/9/94 at 193-210.) In light of those errors, Dr. Brimmer concluded that the correct availability figure would be 57. (*Id.* at 210.)

50. Second, Dr. Brimmer does not know how many black contractors were willing to perform City public works contracts in fiscal years 1979, 1980 and 1981 because he never examined bidding activity on City public works contracts. (*Id.* at 164-65.) If he had examined bidding activity, Dr. Brimmer would have found that only seven black contractors sought to prequalify to bid on City-financed prime construction contracts during fiscal years 1979 to 1981. (Pls.' Ex. 60; Defs.' Ex. 102.) This fact alone destroys Dr. Brimmer's assumption that every black contractor who was available during these years was willing to perform City public works contracts.

49. Third, Dr. Brimmer could not possibly know how many black contractors were qualified to perform City public works contracts in fiscal years 1979, 1980 and 1981 because he never studied the City's bidding and prequalification procedures for public works contracts. (Brimmer, Tr. 6/9/94 at 190-92.) Moreover, the document that Dr. Brimmer relied upon for determining his availability figures, the Pre-1982 MBE & WBE

Report and Directory, does not contain any information about the qualifications of the firms listed. (*See* Defs.' Ex. 104; Defs.' Ex. 16.) Without first examining the City's prequalification requirements, and then comparing these requirements to the qualifications of the black firms that sought to participate in City public works contracting, it is impossible for Dr. Brimmer to conclude that qualified black contractors were excluded from participating in City construction contracts because of discrimination.

52. Fourth, Dr. Brimmer does not know how many black contractors were able to perform City public works contracts in fiscal years 1979, 1980 and 1981 because he never measured black participation in the entire Philadelphia construction industry. As will be discussed more fully herein, Dr. Brimmer never examined the full extent of black participation in subcontracting or federally-assisted public works contracts let by the City. Without examining this information, it is impossible to draw any conclusions about the exclusion of blacks from public contracting.

53. Finally, Dr. Brimmer never measured the number of contractors actually engaged by the City to perform particular services. Dr. Brimmer's disparity ratios were calculated on the assumption that there were 8050 non-minority construction contractors in the Philadelphia SMSA who were qualified, willing and able to perform City public works contracts in 1982. (Defs.' Ex. 6 at ¶ 19; Defs.' Ex. 7 at 15.) As stated above, Dr. Brimmer never examined bidding activity on City public works contracts. If he had examined bidding activity, Dr. Brimmer would have found that only 273 construction companies sought to prequalify to bid on City public works contracts in fiscal year 1980, and that 318 construction companies sought to

prequalify to bid on City public works contracts in fiscal year 1981. (Pls.' Ex. 15.) Without measuring the number of contractors actually engaged by the City to perform particular services, it is impossible to determine whether black firms were excluded from performing these services. In addition, it is impossible to determine whether black companies even existed to perform the services required by the City. Without examining this information, it is impossible to draw any conclusions about discrimination in City public works contracting.

54. In sum, the court finds that Dr. Brimmer failed to measure the "relevant statistical pool" necessary to perform an accurate disparity study in accordance with the standards set forth in *Croson*. Because Dr. Brimmer's disparity study contains many serious methodological and scientific flaws, the court finds that Dr. Brimmer's opinions about the existence of discrimination in the Philadelphia construction industry are unreliable.

d. *The City's Statistics are not Significant or Actionable*

55. Dr. Brimmer's statistics are not significant or actionable because they do not accurately measure the extent of black participation in the Philadelphia construction industry in the years prior to the enactment of Chapter 17-500. Dr. Brimmer's disparity study focuses on just one aspect of the Philadelphia construction industry; *i.e.*, black participation in City-financed prime construction contracts over a three year period. It does not measure black participation in subcontracting. It completely ignores substantial black participation in millions of dollars in federally-assisted public works contracts, including two of the largest public works projects let through the City Procurement Department in recent history. Without measuring black

participation in these aspects of the construction industry, it is impossible to evaluate, and misleading to speculate about, the overall representation of blacks in construction expenditures that were awarded by the City. *Croson*, 488 U.S. at 502-03, 109 S.Ct. at 726.

56. The City claims that it does not know what percentage of the total City construction dollars black contractors received as subcontractors on prime contracts let by the City. (Pls.' Ex. 12 at 23.) Before the enactment of Chapter 17-500, the City did not require subcontractors to seek prequalification, and it apparently did not keep records of the subcontractors working on prime contracts let by the City. (Smith, Tr. 5/31/94 at 53-54.)

57. In the face of this potentially damaging flaw to its position, the City declares, without any measurable factual support, that black contractors "did not participate as subcontractors on City Public Works Contracts let in 1979, 1980, and 1981." (Defs.' Ex. 6-G at ¶ 13.) This assertion is based on a cursory review of Procurement Department records conducted by John W. Macklin ("Macklin"), a member of the MBEC staff and a proponent of the legislation. According to the testimony offered into evidence, Macklin's review entailed the following: He first went to a log at the Procurement Department that listed every public works contract let in fiscal years 1979 to 1981. (Pls.' Ex. 63 at 12.) That log contained the name of the prime contractor, the identity of the contract, and the amount of the contract. (*Id.*) Macklin went through the entire log and wrote down any contract and its amount where he recognized, presumably from memory, the contractor to be a minority contractor. (*Id.*) Macklin did not compare the log against any comprehensive list of minority contractors. (*Id.*)

He also went to the contract files and looked for contracts in excess of $30,000.00 that in his view appeared to provide opportunities for subcontracting. (*Id.* at 13.) With that information, Macklin examined some of the project engineer logs for those projects to determine whether minority subcontractors were used by the prime contractors. (*Id.*) Macklin did not look at every available project engineer log. (*Id.*) Rather, he looked at a random 25 to 30 percent of all the project engineer logs. (*Id.*) As with his review of the Procurement Department log, Macklin determined that a minority subcontractor was used on the project only if he personally recognized the firm to be a minority. (*Id.*) Quite plainly, Macklin was unable to determine. Whether minorities were used on the remaining 65 to 70 percent of the projects that he did not review. When questioned whether it was possible that minority subcontractors did perform work on some City pubic works projects during fiscal years 1979 to 1981, and that he just did not see them in the project logs that he looked at, Macklin answered "it is a very good possibility." (*Id.* at 16.)

58. Macklin's affidavit, dated May 29, 1992, was part of the data supplied by the City to Dr. Brimmer for use in his study. (*See, e.g.*, Defs.' Ex. 6.) Based on Macklin's unfounded assertion in paragraph 13 that black contractors did not participate as subcontractors, Dr. Brimmer concluded:

> black firms have had few, if any, opportunities to participate with white-owned contractors through sub-contracting and joint ventures. Consequently, they have found it difficult to acquire experience that would develop their capacity to undertake large and complex projects.

(Defs.' Ex 7 at 4.)

59. During cross-examination, Dr. Brimmer was asked whether his reliance on Macklin's affidavit as the basis for his assumption that black firms received no subcontracts during fiscal years 1979 to 1981 was reasonable in light of Macklin's testimony as to the method that he used to develop the facts to make such a statement. Dr. Brimmer responded: "Sir, I have made no presentation to this Court as to participation by black minorities or blacks in subcontracting. I couldn't possibly — either misleading or misinforming the Court because I didn't do it." (Brimmer, Tr. 6/10/94 at 101.)

60. Given the incomplete and imprecise nature of Macklin's survey, and Dr. Brimmer's admission that the survey was unreliable, the court finds that the City's contention that blacks did not participate as subcontractors on City public works contracts during fiscal years 1979 to 1981 to be without merit.

61. Furthermore, even if the City's position that blacks did not participate as subcontractors on City public works contracts was correct, Dr. Brimmer's statistics are not significant or actionable because they omit the extent of black participation in millions of dollars of federally-assisted public works contracts let by the City Procurement Department. *See O'Donnell,* 963 F.2d at 425-26.

62. In the late 1970s, Congress enacted a series of statutes, including the Public Works Employment Act of 1976, 42 U.S.C. § 6701, *et seq.,* which provided billions of dollars of federal funds to state and local governments for use in local public works projects. Many, if not all, of these statutes required at least ten percent minority participation in the public works projects. *See, e.g.,* 42 U.S.C. § 6705(f)(1)(B)(2) (1976). With

the passage of this legislation, minority contractors began to participate to a great extent in federally assisted construction projects. (Joint Ex. 4 at 502-05.)

63. Between 1979 and 1982, more than half of the public works contracts let by the Procurement Department were federally-assisted public works contracts. (Pls.' Ex. 16.) Minorities participated to a large extent in these contracts as subcontractors.[12] (*Id.*) City Procurement Department records for fiscal years 1979, 1980 and 1981 indicate that at least 22 black-owned construction companies from the Philadelphia SMSA earned more than $18 million as subcontractors on 17 public works contracts let by the City during this period.[13] (*Id.*)

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12. When Mayor Green vetoed the first version of Chapter 17-500, he specifically noted:

> Between January 1, 1981 and March 31, 1982, minorities obtained $57.2 million in federally-assisted City construction contracts, amounting to 12.8 percent of all such contracts that were let. Since last July 1, [1981] miinorities and women obtained $1.6 million of professional services contracts in city operating departments, amounting to 16.3 percent of all such contracts let. While I agree with the ends which Bill No. 1174-A seeks to achieve, those ends cannot justify the means used in the bill.

(Pls.' Ex. 61 at 552.)

13. These figures do not include an additional $1.7 million earned by black-owned electrical and construction supply companies in the Philadelphia SMSA. (Pls.' Ex. 16.) Two black-owned construction companies from outside the Philadelphia SMSA earned an additional $1.8 million as subcontractors on these contracts. (*Id.*)

At least 15 of these contracts were federally-funded. (*Id.*) In addition, during the trial, Edward W. Robinson, Jr., the former Executive Director of the OMO from 1980 to 1982, testified that in fiscal year 1982 alone, minorities succeeded in obtaining between 20 and 25 federally assisted public works contracts worth approximately $50 million. (Robinson, Tr. 6/8/94 at 78.)

64. In fiscal year 1979, the Procurement Department awarded 507 public works contracts worth $218,160,102.13. (Pls.' Ex. 13 at 10.) Nearly half of this amount, $106,898,943.00, was awarded by the City on just six federally-assisted contracts for construction of the Center City Commuter Rail Connection and the Airport High Speed Line. (*Id.* at 17-21.) Although none of these City contracts were awarded to black-owned construction companies acting as prime contractors, several black contractors participated as subcontractors in these and other contracts for construction of the Center City Commuter Rail Connection and the Airport High Speed Line. (Pls.' Ex. 16.) For example, Keystone Steel Construction Co. ("Keystone") of Woodbury, New Jersey, an OMO certified black-owned construction company specializing in the placing of reinforcing steel structure and pre-cast concrete erection, was awarded at least $5,381,092.00 in subcontracts on three contracts for construction of the Market East Train Station and Center City Commuter Rail Connection. *(Id.)* Also, C. Hannah Construction Company ("Hannah"), an OMO certified black-owned construction company located in Philadelphia, was awarded more than $4,600,000.00 in subcontracts on three of the prime contracts awarded by the City for construction of the Market East Train Station and Center City Commuter Rail

Connection and demolition of Philadelphia General Hospital.[14] (*Id.*)

65. The City's argument that black contractors were discriminated against in the award of City contracts is substantially undermined by the figures for black participation in federally-assisted construction contracts that were also let by the City Procurement Department. It is unclear why Dr. Brimmer never included, nor even mentioned, black participation in federally-assisted construction contracts in either his original or supplemental expert reports.[15] In fact, the City never made any reference to these projects until the contractors uncovered this information from the City's files and presented it at trial.

66. In paragraph 11 of his May 29, 1992 affidavit, Dr. Brimmer states:

> At the request of attorneys for the City of Philadelphia, Brimmer and Company examined statistical, historical and anecdotal evidence relating to participation of minority business enterprises (MBES) . . . in the construction industry in the Philadelphia metropolitan area, both in the public and private sectors. . . . The City of Philadelphia attorneys requested that we determine and

14. Contract No. 79-4246 was a $1,585,000.00 City-funded contract awarded to Cleveland Wrecking Co. for demolition and alteration of the Philadelplhia General Hospital Complex. (Pls.' Ex. 16.) Hannah acted as a fifteen percent subcontractor. (*Id.*)

15. Provided, of course, that the City furnished this data to Dr. Brimmer.

> document whether MBES . . . have suffered disparate treatment in bidding and awards for construction contracts let by the City or by private owners and to appraise whether such statistical disparities reflected past or present discrimination.

(Defs.' Ex. 6 at ¶ 11.)

67. Dr. Brimmer's omission of any reference to black participation in federally-assisted public works contracts let by the City Procurement Department leads this court to believe either:

(a) Dr. Brimmer's broad assertion that he measured minority participation in the Philadelphia construction industry does not cover as wide an inquiry as history and the City's records deserved;

(b) Dr. Brimmer did measure minority participation in the Philadelphia construction industry on a broad front, but for reasons that are unclear, adopted a selective approach in forming his conclusions that resulted in a somewhat narrow, albeit favorable, interpretation of poor minority participation in only one part of the Philadelphia construction industry, which did not include subcontracting or federally-assisted public works contracts; or

(c) Dr. Brimmer measured only that part of the construction industry that the City wanted him to measure, as represented or limited by the information the City furnished, or failed to supply, regarding black participation in subcontracting or federally-assisted public works contracts let by the City Procurement Department.

68. If any one or combination of these circumstances is correct, and if Dr. Brimmer's "disparity study" or opinions are the product of a combination of any of these alternatives, then Dr. Brimmer's conclusions cannot be sound and must, as a matter of law, be rejected. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, __ U.S. __, 113 S.Ct. 2786, 125 L.Ed.2d 469(1993). Further, given Dr. Brimmer's conceded failure to measure what we now know to be the sizeable extent of black participation in federally-assisted public works contracts during the relevant period, the court finds that Dr. Brimmer's opinions about the existence of racial discrimination in the Philadelphia construction industry are unreliable. Those conclusions have not been tested, and, indeed, because of the cursory and incomplete nature of the factual data that Dr. Brimmer based his conclusions upon, they are not testable. *See Daubert*, __ U.S. at __ - __, 113 S.Ct. at 2796-99. *See also In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 742-43 (3d Cir.1994).

69. Further, Dr. Brimmer's unhesitating acceptance of the City's assertion that 195 minority construction contractors were qualified, willing and able to perform City public works contracts during the relevant period violates the principles of the scientific method, whereby a hypothesis is tested using different variables that have been determined to be accurate. Dr. Brimmer never attempted to validate the City's availability figure, nor did he even examine the underlying document from which this figure was allegedly obtained. Indeed, testimony at the trial later demonstrated that this number included both black and non-black firms located both inside and outside of the Philadelphia SMSA, and many of these firms were not involved in the construction industry. Dr. Brimmer simply never bothered to test the figures that were furnished to him. Consequently, any

calculations based on these figures resulted in opinions that lacked the necessary "fit" deemed essential to the issue before the court. *Daubert*, __ U.S. at __ - __, 113 S.Ct. at 2796-99; *Paoli*, 35 F.3d at 742-43. *See also United States v. Downing*, 753 F.2d 1224, 1238-39 (3d Cir. 1985).

70. Finally, Dr. Brimmer's statistics regarding the one area of the Philadelphia construction industry that he did purportedly measure, City prime contracting during fiscal years 1979, 1980 and 1981, are not significant. Here, only seven black contractors sought to apply for prequalification to bid on City construction contracts during this period. (Pls.' Ex. 60; Defs.' Ex. 102.) Even if every one of these seven black contractors was unsuccessful in obtaining prequalification, it would not provide a statistically significant basis from which to generate about the existence of racial discrimination in the Philadelphia construction industry, because there could be any number of neutral reasons why such a small number of contractors could not meet the City's stringent prequalification requirements.[16]

71. In sum, the court finds that Dr. Brimmer's statistics are not significant or actionable because they omit the extent of black Participation in subcontracting and federally assisted public works projects let by the City Procurement Department. Additionally, Dr. Brimmer's statistics regarding black participation in City-financed prime contracts are not significant or actionable because only seven black contractors sought to apply for prequalified to bid on City construction contracts during this period, and the experience of this small number of

16. Actually, some of the black contractors who sought prequalification obtained it and actually won their bids, as evidenced by the fact that black contractors were awarded five City-financed prime contracts worth $667,501.00 in fiscal years 1979 and 1980. (Defs.' Ex. 107.)

black contractors, some of whom went on to obtain prequalification and win their bids, does not provide a statistically significant basis from which to generalize about the existence of racial discrimination in the entire Philadelphia construction industry.

72. Assuming as a matter of law that some version of Dr. Brimmer's conclusions could be said to survive the faults concerning the omissions of data and flawed methodology, the court, as a finder of fact, rejects Dr. Brimmer's conclusions. The reasons are very similar to the grounds that supports rejection as a matter of law. The shortcomings in Dr. Brimmer's approach, including the development of the grounds for his opinions and his failure to include pivotal facts in arriving at his conclusions, causes the finder of fact to have no confidence in the scientific nature of Dr. Brimmer's opinions or in the validity of the factors as he crafted them to purportedly support his opinions on the questions to be decided.

e. *It is Impossible to Present Contrasting Statistical Data Because of Incomplete Information*

73. Without any complete information about black participation in subcontracting or federally-assisted public works projects let by the City Procurement Department, it is quite simply impossible to present contrasting statistical data on black representation in the City's construction industry. *Croson*, 488 U.S. at 502-03, 109 S.Ct. at 726. Even without contrasting statistical data, however, the evidence uncovered at trial suggests that the low level of black participation in City-financed prime contracts in the three years immediately preceding the enactment of Chapter 17-500 was not caused by racial discrimination. Instead, based on the evidence of record,

the court finds that any statistical disparities can be directly attributed to the low availability of qualified black contractors in the Philadelphia construction industry, and their sizable participation in federally-assisted public works projects, at that time.

2. *"Passive Participant"*

74. In *Croson*, the Supreme Court held that a municipality has a compelling government interest in redressing not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities legislative jurisdiction, so long as the municipality in some way participated in the discrimination to be remedied by the program. *Croson*, 488 U.S. at 491-92, 537-38, 109 S.Ct. at 720-21, 744-45. To satisfy this requirement, "the government actor need not be an active perpetrator of such discrimination; passive participation will satisfy this subpart of strict scrutiny review." *Coral Constr.*, 941 F.2d at 916 (citation omitted). Additionally, "the mere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong." *Id.*

75. As previously stated, the City contends that Chapter 17-500 was enacted because the City had a compelling government interest in remedying past discrimination in the Philadelphia construction industry. The City claims that, even if the City itself was not actively discriminating against minorities, it was at least passively participating in racial discrimination by supporting discriminatory contractors with City tax dollars. The City, however, has not made any showing to support this contention beyond the bare and conclusionary statements of City officials that racial discrimination existed in

the Philadelphia construction industry. None of the statements made by proponents of the set-aside legislation have been substantiated by any objective evidence. Consequently, these statements have little or no evidentiary value.[17] *Croson,* 488 U.S. at 500, log S.Ct. at 725.

76. Presumably, if the City had any evidence of racial discrimination in the Philadelphia construction industry, it would be located in the Mes of the Philadelphia Commission on Human Relations ("Commission") the City agency charged with investigating and eliminating discriminatory conduct within the City of Philadelphia. *See* Phila.Code § 9-1101, *et seq.* In October 1979, the City Procurement Department developed standard requirements for the award, execution, and performance of public works contracts.[18] (Pls.' Ex. 11.) As part of these standard requirements, prime contractors who were engaged to perform public works projects are required to "provide equal employment opportunities in connection with all work performed and materials furnished and supplied pursuant to th[e] contract or to any subcontract hereunder." (*Id.*

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17. For example, during the trial, the City presented Oscar Gaskins ("Gaskins"), former general counsel to the General and Specialty Contractors Association of Philadelphia ("GASCAP") and the Philadelphia Urban Coalition, to testify about minority participation in the Philadelphia construction industry during the 1970s and early 1980s. Gaskins testified that, in his opinion, black contractors are still being subjected to racial discrimination in the private construction industry, and in subcontracting within the City limits. (Gaskins, Tr. 6/7/94 at 162-80.) However, when Gaskins was asked by the court to identify even one instance where a minority contractor was denied a private contrtact or subcontract after submitting the lowest bid, Gaskins was unable to do so. (*Id.* at 181.)

18. Many, if not all, of the City's standard requirements for public works contracts are still in effect.

at ¶ 14(a).) The prime contractor is prohibited from discriminating against any employee or applicant for employment on the basis of race, color, religion or national origin, or from discriminating in the award of any subcontract. (*Id.*) The City's standard requirements warn that discrimination will be deemed a "substantial breach" of the public works contract which could subject the prime contractor to an investigation by the Commission and, if warranted, fines, penalties, termination of the contract and forfeiture of all money due. (*Id.* at ¶ 14(b) and (c).)

77. Even though the City's antidiscrimination requirements were in place at least three years before the enactment of Chapter 17-500, no evidence was presented at the trial that the Commission ever reviewed or investigated *any* complaints about discrimination in the Philadelphia construction industry. As in *Croson* "[t]he complete silence of the record concerning enforcement of the city's own antidiscrimination ordinance flies in the face of the [Citys] vision of a 'tight-knit industry' which has prevented blacks from obtaining the experience necessary to participate in construction contracting." *Croson* 488 U.S. at 502, n. 3, 109 S.Ct. at 726, n. 3.

78. From the vantage point of what must be shown to address an equal protection challenge to a race-based ordinance such as Chapter 17-500, the court finds that there is no credible evidence that racial discretion existed in the Philadelphia construction industry before the enactment of Chapter 17-500. In addition, even if private discrimination did exist in the construction industry, or by individual contractors, there is no evidence that the City acted as a passive participant to such discrimination by using tax dollars to fund public works projects by contractors who practiced discrimination.

Appendix C

3. Membership in Contractors Associations

79. In *Croson*, the Supreme Court stated that low membership of blacks in trade organizations, standing alone, cannot not establish a *prima facie* case of discrimination, but it could be relevant to the "compelling government interest" inquiry if the city could link it to the number of local MBEs eligible for membership. *Croson*, 488 U.S. at 503, 109 S.Ct. at 726. The Court stated:

> If the statistical disparity between eligible MBE's and MBE membership were great enough, an inference of discriminatory exclusion could arise. In such a case, the city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market.

Id. (citations omitted).

80. The City contends that it had a compelling government interest in enacting Chapter 17-500's race-based preference because black contractors have historically been denied membership in the contractors associations. To support this argument, the City offers the opinion of Dr. Brimmer that blacks had a disproportionately low statistical representation in the membership of the contractors' associations which could only be explained by racial discrimination. (Defs. Ex. 6 at ¶¶ 38-40.)

81. Dr. Brimmer's opinion is based on paragraphs 6 through 11 of John Macklin's affidavit. (*Id.* at ¶ 38.) In his

affidavit, Macklin states that he reviewed the bylaws of the plaintiffs' associations, and the OMO's 1982 Directory of certified MBEs and WBES, to determine which of the firms listed by the OMO were eligible for membership in the plaintiffs' associations. (Defs.' Ex. 6-G at ¶¶ 6-7.) Based on this review, Macklin opined that 71 OMO-certified MBEs and WBEs were eligible for membership in the SADV; 27 OMO-certified MBEs and WBEs were eligible for membership in the CAEP; 44 OMO-certified MBEs and WBEs were eligible for membership in the EBA; and 50 OMO-certified MBEs and WBEs were eligible for membership in the GBCA (*Id.* at ¶¶ 8-11.)

82. In paragraph 40 of his May 29, 1992 affidavit, Dr. Brimmer states:

> Although we are unable to construct disparity indices, we note that City official John Macklin has determined that as of 1982 there were substantial numbers of MBE and WBE firms eligible to members of each of these associations such that representation in CAEP by 1 MBE member, in GBCA by 3 MBE members and 2 WBE members, in SADV by 1 MBE member and 1 WBE member, and 1 MBE member in EBA, demonstrates discriminatory exclusion and token participation.

(Defs.' Ex. 6 at ¶ 40.)

83. Based on his review of Macklin's figures, and without examining any additional evidence, Dr. Brimmer concluded "[t]hese statistics demonstrate that the associations either totally

excluded MBEs . . . or limited their participation to token levels." (*Id.* at ¶ 39.)

84. Dr. Brimmer's reliance on Macklin's affidavit is misplaced. First, Macklin does not point to any provision in the associations' bylaws that act to limit or exclude blacks or bylaws that act to limit or exclude blacks from membership. Second, Macklin does not identify the criteria for membership in the plaintiffs' associations. Without this information, it is impossible to objectively determine how any contractor could be refused membership in the plaintiffs' associations. Third, the 1982 OMO Directory, from which Macklin allegedly determined which MBEs were eligible for membership in the plaintiffs' associations, does not provide any information from which Macklin could have possibly made such a determination.

85. The 1982 OMO Directory is a ten page list of 241 contractors who were certified by the OMO as being "bona fide" MBEs and WBEs. (Defs.' Ex. 17.) The list contains only the name of the firm, the date its application for "bona fide" certification was heard by the OMO, the firm's certification number, and the date that its OMO certification would expire (usually one year after the date of its hearing). *(Id.)* The directory does not contain any information about the size of a firm; the race of its owners; the type of work it performed; a firm's location or principal place of business; whether the firm had any equipment or employees; or the amount of revenue generated by the firm in a given year. *(Id.)*

86. Among other things, the size of a firm, the type of work it performs, and its financial capabilities, are all factors that must be considered before anybody can accurately determine whether a given firm would be eligible for

membership in the plaintiffs' associations. Since Macklin never considered any these factors, his opinions about MBE eligibility are unreliable. Furthermore, Dr. Brimmer's blind reliance on Macklin's observations, without any independent analysis or confirmation, is a bizarre scientific technique. Neither Macklin's unsupported opinions, nor Dr. Brimmer's untested hypotheses, are sufficient for this court to conclude that the contractors' associations discriminated against black contractors.

87. During the trial, the City did not offer any additional evidence to support its claim that the contractors' associations discriminated against black contractors. In fact, the City's claim was undermined by the uncontroverted testimony of John Smith that no black contractor who has ever applied for membership in the CAEP has been denied. (Smith, Tr. 5/31/94 at 30.) Moreover, the evidence presented at trial supports a finding that many black contractors may not have been eligible for membership in the contractors' associations simply because they lacked the resources and skill to perform large public work projects.

88. To be an active member of the CAEP in 1982, a contractor would have to perform on-site construction work of the type that CAEP members would normally perform, such as heavy and highway, utility and railroad construction, or the construction of water and sewer treatment plants. (*Id.* at 27.) The annual dollar volume of work performed by CAEP members in 1982 ranged from $200,000.00 up to millions of dollars. (*Id.* at 28.) Most CAEP members in 1982 had large investments in capital equipment such as heavy construction machinery, loaders, backhoses, and bulldozers. (*Id.* at 28-29.) Such specialized equipment costs between $60,000.00 for a small backhoe, to $250,000.00 for a bulldozer, and $400,000.00

for an earthmover. (*Id.* at 33.) By comparison, federal census data indicates that 459 out of 528, or 87 percent, of the black-owned construction companies in the Philadelphia SMSA in 1982 did not have any employees, and thus would be unable to complete public works projects. (Pls.' Ex. 5, Table 5.) The remaining 13 percent of black-owned construction companies, or a total of 69 firms, employed an average of only 3.8 employees per firm, and generated average revenues totalling just $291,028.00. (Pls.' Ex. 2 at 20.)

89. Based solely on a comparison of the size of the firms and the amount of revenue generated, it is highly unlikely that more than a few black contractors would be eligible for membership in the CAEP in 1982. Moreover, the City has not identified even a single black contractor who was eligible for membership in any of the plaintiffs' associations, who applied for membership, and was denied.

90. Evidence of low black membership in the contractors' associations, standing alone, is not probative of discrimination in the Philadelphia construction industry. *Croson,* 488 U.S. at 503, 109 S.Ct. at 726. As the Supreme Court stated in *Croson:*

> There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction. . . . The mere fact that black membership in these trade organizations is low, standing alone, cannot establish a prima facie case of discrimination.

Id.

91. For the foregoing reasons, the court finds that the City's claim, and Dr. Brimmer's opinion, that the plaintiffs' associations discriminated against black contractors is not supported by the evidence, and it cannot form the basis for the court to conclude that the City had a compelling government interest in enacting Chapter 17-500's race-based preference.

D. Chapter 17-500's Racial Preference Is Not "Narrowly Tailored" to Remedy Identified Discrimination

92. Due to the court's previous finding that the City did not have a "compelling government interest" in enacting Chapter 17-500's racial preference, it is impossible to assess whether this preference is "narrowly tailored" to remedy prior discrimination because it is not linked to identified racial discrimination in any way. *Croson,* 74 488 U.S. at 507-08, 109 S.Ct. at 729. Indeed, as noted in section D-2, *infra,* Chapter 17-500's racial preference is not "narrowly tailored" to even the perceived objective declared by City Council as the reason for the Ordinance in the first place. Nevertheless, because the Third Circuit found that the City created a disputed issue of fact on the "narrowly tailored" issue; *see Contractors*, 6 F.3d at 1009; the court makes the following findings of fact on this issue.

1. The City Failed to Consider Alternative "Race-Neutral Measures"

93. The City contends it enacted Chapter 17-500 only after race-neutral alternatives proved insufficient to improve minority participation in City contracting. To support this contention, the City points to two programs that were implemented in the late 1960s and early 1970s to assist

minorities to compete more effectively in the Philadelphia construction industry. The first of these programs, the Philadelphia Plan, was instituted in the late 1960s to promote the hiring of minorities on public construction sites. (Coleman, Tr. 6/7/94 at 100-11.) The second program, the Philadelphia Urban Coalition's Minority Contractors Training and Assistance Program, was implemented in 1970 to train minority contractors and help them obtain financing and bonding so that they could proceed from one level to the next in the construction industry. (Gaskins, Tr. 6/7/94 at 137.) The City contends these two "race-neutral" programs were unsuccessful, and that City Council considered the efficacy of these programs before it enacted Chapter 17-500.[19] The City's position, however, is contradicted by the testimony of its own witnesses and by the defendants' exhibits.

94. First, the evidence submitted at trial suggests that at least one of these programs was successful. In its first eighteen months, the Minority Contractors Training and Assistance Program succeeded in tripling the value of construction contracts awarded to minorities, from $4,000,000.00 awarded

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19. For the record, neither of these two programs were "race-neutral" as the term is applied in *Croson*. *See Croson*, 488 U.S. at 509-10, 109 S.Ct. at 730. Both programs were implemented for the sole purpose of increasing contracting opportunities for minorities. (Coleman, Tr. 6/7/94 at 100-11; Defs.' Ex. 111; Defs.' Ex. 112; and Defs.' Ex. 113.) The Urban Coalition's program, in particular, was established to provide financial and technical assistance to minority contractors who were unable to obtain credit because they had limited experience. (Defs.' Ex. 112.) In addition, there is no evidence that either of these programs was supported by the City. In fact, the Urban Coalition's Minority Contractors Training and Assistance Program began in February 1970 with a $500,000.00 grant from the federal government's "Model Cities" program. (*Id.*) The initial grant was followed one year later by another federal grant of $700,000.00. (*Id.*)

to all minority contractors in 1969 to $12,004,268.00 awarded to the program's 144 participants in 1970 and the first half of 1971. (Defs.' Ex. 112.) Oscar Gaskins, the director of the Urban Coalition's program from 1970 until 1974, testified that the Urban Coalition succeeded in fulfilling a number of its program goals. (Gaskins, Tr. 6/7/94 at 148-80.) Between 1970 and 1974, the Urban Coalition guaranteed loans for between 40 and 50 minority contractors. (*Id.* at 148.) In addition, another 70 to 80 minority contractors received non-financial assistance from the Urban Coalition, including assistance with accounting, estimating, and dealing with the Internal Revenue Service, the City Procurement Department, local unions and private contractors. (*Id.* at 151-57.) By 1974, black contractors were obtaining work from the Procurement Department, the Redevelopment Authority, the Philadelphia School District, and the federal government. (*Id.* at 162.) Minority contractors received prime contracts in specialty work such as plumbing, electrical work and street lighting from the City. (*Id.*) Moreover, Gaskins testified that when a minority contractor submitted a bid to the City on a prime contract, and he was the lowest bidder, he got the job. (*Id.* at 180.)

95. Second, there is no evidence that the City considered the effectiveness of these programs when it enacted Chapter 17-500. Indeed, the only evidence that the City offered on this point was the testimony of former City Council President Joseph Coleman ("Coleman") that he was *aware of* these two programs when Chapter 17-500 was enacted in 1982 (but Coleman could not recall any details about the programs). (Coleman, Tr. 6/7/94 at 100-11.) Contrary to the City's position, a fair reading of the record reveals that City Council was only interested in implementing a set-aside ordinance that was modeled after certain federal legislation enacted by Congress in the late

1970s, and upheld by the Supreme Court in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980). (Joint Ex. 4 at 501-13.) City Council was not interested in considering race-neutral measures, and it did not do so.

96. The City's argument that it enacted Chapter 17-500 only after other race-neutral programs proved insufficient to improve minority participation in City contracting is further weakened by the admitted success of the City's Office of Minority Opportunity during the two years immediately preceding the enactment of Chapter 17-500.

97. The OMO was established by the City in October 1980 to certify the credentials of minority contractors who were seeking contracting opportunities from the Urban Mass Transit Authority ("UMTA").[20] (Robinson, Tr. 6/8/94 at 8-9.) Before a minority contractor could participate in the UMTA project, the contractor first had to demonstrate to the OMO that it was, in fact, owned and controlled by minorities (proof of ethnicity was required), and that it was qualified to perform the contract that it was seeking. (*Id.* at 19-23.)

98. As part of its certification process, the OMO conducted extensive on-site inspections of a prospective minority contractor's facilities to determine whether the information contained in the contractor's application for certification was accurate and truthful. (*Id.* at 23-24.) During these on-site inspections, OMO staff members would examine the contractor's financial and corporate records, the number of

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20. The UMTA was a federally-funded, $530 million project to build the Center City Commuter Rail Tunnel and Airport High Speed Line. (Robinson, Tr. 6/8/94 at 9.) Because the project was federally-assisted, it contained a ten percent set-aside for minorities.

workers employed by the contractor, the amount of equipment owned by the contractor, the backgrounds of corporate officers, the contractor's prior experience, and whether the contractor kept any supplies onsite. (*Id.* at 23-26.) If the OMO staff determined that the contractor's credentials were in order, and after a public hearing, the OMO would certify the contractor as "bona fide" for one year. (*Id.* at 27-29, 85.) After a minority contractor was certified, the contractor would be given a certification number and its name would be placed on a list maintained by the OMO. (*Id.* at 32; Defs.' Ex. 17.) The OMO's list was included in a manual that was made available to non-minority contractors to use as a reference for "bona fide" MBEs that the non-minority contractor could use in the areas for which the MBEs had expertise. (Robinson, Tr. 6/8/94 at 32, 67.)

99. Between April 1982 and August 1983, the OMO certified 241 minority contractors as "bona fide," out of approximately 680 contractors that applied. (*Id.* at 85.) During fiscal year 1982, the OMO succeeded in obtaining 20 to 25 public works contracts, worth approximately $50 million, for OMO-certified MBES. (*Id.* at 78.) In addition, in 1982 the, OMO received an award from the United States Department of Transportation "in recognition of its strong and effective MBE certification procedures and for its exceptional record of MBE contracts awarded in fiscal year 1982." (*Id.* at 77.)

100. Despite the obvious success that the OMO and Urban Coalition had in obtaining contracting opportunities for minorities, there is no evidence that the City has ever considered implementing a program designed to expand the goals of the Urban Coalition and OMO programs to provide

assistance to disadvantaged contractors of all races.[21] *See Associated Gen. Contractors of California, Inc. v. Coalition*, 950 F.2d 1401, 1417 (9th Cir.1991), *cert. denied*, 503 U.S. 985, 112 S.Ct. 1670, 118 L.Ed.2d 390 (1992).

101. In *Croson*, the Supreme Court stated:

> States and their local subdivisions have many legitimate weapons at their disposal both to punish and prevent present discrimination and to remove arbitrary barriers to minority advancement.
>
> . . . .
>
> Even in the absence of evidence of discrimination, the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. Many of the formal barriers to new entrants may be the product of bureaucratic inertia more than actual necessity, and may have a

21. In fact, the City abandoned the OMO's strict, but valuable, certification procedures when Chapter 17-500 was enacted in November 1982. (Defs.' Ex. 101.)

> disproportionate effect on the opportunities open to new minority firms. Their elimination or modification would have little detrimental effect on the city's interests and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race. The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks. Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards.

Croson, 488 U.S. at 494, 509-10, 109 S.Ct. at 722, 730.

102. Every fact witness who addressed the City's procurement procedures at trial testified that these procedures created significant barriers to entry to the public works market for contractors of all races.[22] (*See, e.g.*, Smith, Tr. 5/31/94 at 42-43, 60; Gaskins, Tr. 6/7/94 at 134-64.) Some witnesses testified that small contractors, regardless of their race, did not

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22. For example, John Smith testified that the City's requirement that contractors must obtain prequalification to bid on a contract at least two weeks prior to the opening of a bid is a "real hassle" because some City agencies, such as the Water Department, may let as many as ten or twelve contracts a month, and a contractor interested in bidding on these contracts is required to submit a new prequalification application for each contract. (Smith, Tr. 5/31/94 at 42-43, 60.) Smith testified that the elimination of this requirement would eliminate a lot of unnecessary paperwork and activity. (*Id.*) According to Smith, the CAEP has suggested to the Procurement Department that it should implement a prequalification requirement similar to that used by PennDOT, where contractors prequalify for a certain range of contracts on an annual basis. (*Id.*)

have the willingness or the ability to complete the paperwork, or otherwise fulfill the burdensome administrative requirements, required by the City to participate in its public works projects. (Gaskins, Tr. 6/7/94 at 134-64.) Nevertheless, there is no evidence before this court that the City has ever attempted to identify barriers to entry in its procurement bureaucracy, or that it has substantially altered its procurement procedures, either before or after the enactment of Chapter 17-500 in 1982.

103. The City has the means to enhance City contracting opportunities for disadvantaged contractors of all races, but it has chosen not to use them. Before the City races to resurrect the race-based preference in Chapter 17-500, it should first consider relaxing its prequalification and bonding requirements for disadvantaged contractors of all races. The City could also implement training and financial assistance programs to assist disadvantaged contractors of all races. It could *vigorously* enforce the antidiscrimination provisions of the City Charter and the Procurement Department's standard contracting requirements. Every one of these truly race-neutral alternatives would have little detrimental effect on the City's interests and would serve to increase the opportunities available to minority business without classifying on the basis of race.

2. The City's Fifteen Percent "Goal" for Minority Participation Was Not Selected for a Remedial Purpose

104. During the trial, the City suggested that the Ordinance's fifteen percent "goal" for City contract participation by MBEs is "narrowly tailored" because it reflects the need to account for those contractors who receive waivers, and for contracts that are exempted from the program. The City has not offered any facts to support this conclusion, nor could it,

because very few contractors have ever received waivers of Chapter 17-500's set-aside requirements, and even fewer City contracts have been exempted from the set-aside program. Between July 1, 1987 and June 30, 1990, waivers and exemptions were granted on less than two percent of the City's public works contracts. (*See, e.g.*, Defs.' Ex. 19; Defs.' Ex. 20; Defs.' Ex. 21.) The City has not offered any explanation as to why it is necessary to preserve a fifteen percent set-aside for black contractors when nearly all of the City's public works contracts are included in the set-aside program.

105. The City has also asserted that Chapter 17-500's minority participation "goal" is not related to the minority population of the City of Philadelphia. This argument, however, is contrary to the evidence submitted at trial.[23]

106. When the City Council Committee on Finance met on February 17, 1982 to consider the legislation that would become Chapter 17-500, Carl Singley, one of the drafters of the Ordinance, admitted:

> [W]e felt at the time of the drafting that there was not sufficient data available to this Council that would indicate the number of

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23. The City has steadfastly argued that the fifteen percent goal for MBEs is necessary to remedy pervasive racial discrimination in the Philadelphia Supreme Court stated in *Croson*, "a generalized assertion tha. there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Croson*, 488 U.S. at 498, 109 S.Ct. at 724. The City is no doubt offering this argument because it must, due to a record before City Council that shows that it never attempted to determine the scope of the injury it allegedly sought to remedy with the Ordinance.

> minority businesses that currently exist in Philadelphia and within the surrounding area that would be capable of performing the contracts that the City lets on an annual basis. So the thought in this legislation would first be to . . . arrive at essentially ball park figures for percentage purposes, looking at what we felt was a rough approximation, given the absence of a formal survey of our inventory, of the number of businesses capable of performing in the four areas discussed in the ordinance.

(Joint Ex. 3 at 42.)

107. When Bill No. 1477 was introduced on September 16, 1982, the sponsors of the Ordinance stated in the preamble:

> *Goals. Our goals are reasonable and especially so in light of the actual proportion of minorities and females in the local population.*

(Joint Ex. 4 at 515) (emphasis in original). The sponsors further stated that, in light of the City's 53.65 percent female population and 41.8 percent minority population, the Ordinance's participation goals "reflect a very modest attempt to change what is by any measure a deplorable status quo." [24] (*Id.*)

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24. The legislative history of Chapter 17-500 is replete with references which prove that City Council's enactment of Chapter 17-500 was motivated by racial and gender politics, and not the remediation of any specifically identified discrimination in the Philadelphia construction industry. (*See, e.g.*, Joint Ex. 3 and Joint Ex. 4.)

Appendix C

108. When City Council met to amend Chapter 17-500 in 1988, Councilwoman Joan Specter, one of the original sponsors of the Ordinance, confirmed Carl Singley's admission when she stated:

> We didn't do a study to see whether or not ten percent was proper for women or the percentage for minorities was correct. We knew that there were a lot of women out there and a lot of minorities out there and they weren't getting their share. And we set a goal. And it was pretty arbitrary. It was pretty arbitrary. And we sought to encourage. And that's what this does.

(Joint Ex. 4 at 751-52.)

109. The City's fifteen percent preference for MBEs "cannot in any realistic sense be tied to any injury suffered by anyone." *Croson*, 488 U.S. at 499, 109 S.Ct. at 725. Until this court invalidated Chapter 17-500 in 1990, the Ordinance's fifteen percent preference for MBEs was shared by an amalgam of minorities, including blacks, Hispanics, American Indians, Aleuts, Eskimos, Asians and Native Hawaiians. There is absolutely no evidence that any of these minority groups suffered from racial discrimination in the Philadelphia construction industry. The City's "random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry" leads this court to find that Chapter 17-500's race-based preference is not a "narrowly tailored" remedy for past discrimination.[25] *Id.* at 506,

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25. Moreover, the City has never sought to explain why it is necessary (Cont'd)

109 S.Ct. at 728. As with Richmond, Virginia's minority preference, "[t]he gross overinclusiveness of [Philadelphia's] racial preference strongly impugns the city's claim of remedial motivation." *Id.*

3. Chapter 17-500's Waivers and Exemptions are Insufficient

110. Pursuant to § 17-505(1):

> The MBEC, on its own initiative or at the request of the affected agency, may recommend that an individual contract or contract "package" (i.e., related contracts being bid or awarded simultaneously for the same project or improvement) be made wholly or partially exempt from the [DBE] City contracting goals prior to the advertisement for bids or solicitation of proposals, whenever there has been a determination, reduced to writing and based on the best information available at the time of the determination, that there are an insufficient number of [DBES] within the Philadelphia [SMSA] to ensure adequate

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(Cont'd)

to preserve the fifteen percent minority participation "goal" for just blacks, the only minority group still covered by the set-aside. Black construction contractors may have received a windfall from the Third Circuit's most recent decision in this case, but the City has never offered any evidence to show that the fifteen percent goal is a "narrowly tailored" remedy for past discrimination committed against black construction contractors in the Philadelphia construction industry.

> competition and an expectation of reasonable prices on bids or proposals solicited for the individual contract or contract "package" in question.

Phila.Code § 17-505(1).

111. As with the waiver system in *Croson*, Chapter 17-500's waiver system focuses solely on the availability of MBES; "there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors." *Croson*, 488 U.S. at 508, 109 S.Ct. at 729. The City never offered any explanation at trial to support this obvious defect in its waiver provision. Given the City's complete failure "to tailor [Chapter 17-500's] remedial relief to those who have suffered the effects of prior discrimination," the court can only conclude that § 17-505(1)'s focus on availability is meant to foster administrative convenience. *Id.* This is not a sufficient justification to withstand strict judicial scrutiny. *Id.*

4. Chapter 17-500's Racial Preference is not Geographically Limited to the Philadelphia Area

112. The evidence presented at trial demonstrates that Chapter 17-500's racial preference, as it was applied by the City, was never geographically limited to the Philadelphia SMSA. For example, in fiscal year 1989, American Indian Builders, an MBE from Lewiston, New York received more than $6,000,000.00 in subcontracts on City-financed public works contracts for the installation of sewers and water mains. (Defs.' Ex. 20.) Although Lewiston, New York is located well beyond the Philadelphia SMSA, the full amount of American

Indian Builders' subcontracts were counted toward § 17-503's racial participation requirement.[26] (*Id.*)

113. Even though Chapter 17-500 contains a provision for waiving its racial preference when there are an insufficient number of DBEs in the Philadelphia SMSA to ensure adequate competition, it is clear that the Ordinance was never applied in such a way that it would remedy prior discrimination in the Philadelphia geographic area. Between July 1, 1987 and June 30, 1990, waivers and exemptions were granted on less than two percent of the City's public works contracts. (*See, e.g.*, Defs.' Ex. 19; Defs.' Ex. 20; Defs.' Ex. 21.) At the same time, millions of dollars in subcontracts were awarded to MBEs from outside the Philadelphia SMSA, and every dollar was counted toward fulfilling Chapter 17-500's minority participation goal. (*Id.*)

114. As Philadelphia's set-aside ordinance was applied before this court's injunction, a successful minority contractor from anywhere in the country enjoyed an absolute preference over other local citizens based solely on their race. The same situation exists today, only now it is worse because a successful black contractor from anywhere in the country enjoys an absolute preference over other local citizens, including other minorities, based solely on his race. It is obvious that Chapter 17-500's remaining fifteen percent preference for black

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26. There is also no evidence that American Indian builders lost its DBE status after it acquired more than $6 million in subcontracts in fiscal year 1989. (*See, e.g.*, Pls.' Ex. 62 at 20.) In fact, in fiscal year 1990, American Indian Builders received an additional $5 million in subcontracts on City-financed public works contracts. (Defs.' Ex. 21.) This fact alone supports the contractors' argument that Chapter 17-500 is not narrowly tailored to remedy the effects of past discrimination against minorities in Philadelphia.

contractors, and only black contractors, is not narrowly tailored to remedy prior discrimination. *Croson*, 488 U.S. at 508, 109 S.Ct. at 729.

5. The Ordinance Does Not Have a Limited Duration

115. As originally enacted, Chapter 17-500 contained a sunset provision which called for the Ordinance to expire after a period of seven years. Phila.Code § 17-502(2) (1982). In the preamble to Bill No. 1477, the sponsors of the legislation explained:

> While the ordinance could be extended for an additional ten (10) years, such an extension can only be made upon the recommendation of the Minority Business Enterprise Council and then only through the enactment of another ordinance. This procedure assures what amounts to a de novo review of the appropriateness and efficacy of the goals in light of the then existing circumstances.

(Joint Ex. 4 at 516.)

116. Although Chapter 17-500 was not due to expire until 1989, when City Council amended the Ordinance on May 20, 1987 to expand its coverage to DBES, City Council also extended the effectiveness of Chapter 17-500 until January 1, 1998. Phila.Code § 17-502(2) (1987). Despite the assurances of Chapter 17-500's sponsors in 1982, there is no evidence that City Council conducted a *de novo* review of the appropriateness and efficacy of the program's goals when it amended the Ordinance in 1987. To the contrary, the evidence

suggests that City Council was more interested in *protecting* the fifteen percent of City contract dollars set aside for minorities than determining whether Chapter 17-500's racial preference was still appropriate. (*See, e.g.*, Joint Ex. 4 at 526-84.)

117. The Supreme Court in *Croson* warned that if "amorphous" claims of past discrimination were sufficient to justify a racial preference, than racial preferences of any "duration" would be justified. *Croson*, 488 U.S. at 499, 505, 109 S.Ct. at 724, 727. This case is no different. City Council's extension of Chapter 17-500's duration for an additional eleven and one-half years, which occurred more than two years before the Ordinance was due to expire, without any findings that such an extension was necessary, provides additional evidence that Chapter 17-500's racial preference is not a narrowly tailored remedy for specifically identified instances of prior racial discrimination.

IV. *CONCLUSIONS OF LAW*

118. The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. In this case, the contractors have proven, by a preponderance of the evidence, that Chapter 17-500's fifteen percent "goal" for minority participation in City construction contracting violates the Equal Protection Clause because it denies non-minority contractors the opportunity to compete for a fixed percentage of City contracts based solely on their race. *Croson*, 488 U.S. at 493, 109 S.Ct. at 721.

119. The City has failed to demonstrate that it had a

"compelling government interest" in enacting Chapter 17-500's fifteen percent "goal" for minority participation in City construction contracting. *Id.* at 492, 505, 109 S.Ct. at 721, 727. None of the evidence presented by the City identifies racial discrimination in the Philadelphia public or private construction industry that would authorize the use of race-based remedial relief. *Id.* at 498-506, 109 S.Ct. at 724-28. The court, therefore, holds that the City has failed to demonstrate a compelling interest in apportioning City construction contracting opportunities on the basis of race. *Id.* at 505, 109 S.Ct. at 727.

120. Assuming, for the moment, that the City has demonstrated a "strong basis in evidence for its conclusion that remedial action was necessary," the court finds that the City has failed to demonstrate that Chapter 17-500's fifteen percent "goal" for minority participation in City construction contracting is "narrowly tailored" to remedy identified prior discrimination in the Philadelphia construction industry. *Id.* at 507-11, 109 S.Ct. at 729-31.

121. Because the City has failed to identify the need for remedial action in the awarding of City construction contracts, in the face of the contractors' overwhelming evidence that Chapter 17-500 is the product of racial balancing, the court finds that Chapter 17-500's fifteen percent "goal" for black participation in City construction contracting violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

122. The City is hereby permanently enjoined from enforcing Chapter 17-500's racial preference, and the regulations promulgated thereunder, in the award of City construction contracts.

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DECIDED OCTOBER 7, 1993

CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, INC.; General Building Contractors Association, Inc.; Associated Master Painters & Decorators of Philadelphia, Inc.; Employing Bricklayers Association of Delaware Valley, Inc.; Interior Finish Contractors Association, Inc.; Mechanical Contractors Association of Eastern Pennsylvania, Inc.; Roofing and Sheet Metal Contractors Association, Inc.; Sub-Contractors Association of Delaware Valley, Inc.; National Electrical Contractors Association, Inc.

v.

CITY OF PHILADELPHIA; Elizabeth Reveal, as Director of Finance for the City of Philadelphia; Curtis Jones, Jr., as Director of the Minority Business Enterprise Council; United Minority Enterprise Associates, Inc.

United Minority Enterprise Associates Inc., Intervening Defendant in district court, Appellant in 92-1880.

City of Philadelphia, Elizabeth Reveal, as Director of Finance for the City of Philadelphia, and Curtis Jones, Jr., as Director of the Minority Business Enterprise Council, Appellants in 92-1887.

Nos. 92-1880, 92-1887.

United States Court of Appeals,
Third Circuit

Appendix D

Argued June 17, 1993.

Decided Oct. 7, 1993.

* * *

Robert T. Vance, Jr. (argued), Vance, Jackson, Simpson & Vance-Lewis, Philadelphia, PA, for appellant, United Minority Enterprise Associates, Inc.

Judith E. Harris (argued) and E. Jane Hix, Office of City Sol., Philadelphia, PA, for appellants, City of Philadelphia, Elizabeth Reveal, as Director of finance for the City of Philadelphia, and Curtis Jones, Jr., as Director of the Minority Business Enterprise Council.

John J. McAleese, Jr. (argued) and John H. Widman, McAleese, McGoldrick & Susanin, King of Prussia, PA, for appellees, Contractors Ass'n of Eastern Pennsylvania, Inc., Gen. Bldg. Contractors Ass'n, Inc., Employing Bricklayers Ass'n of Delaware Valley, Inc., and Sub-Contractors Ass'n of Delaware Valley, Inc.

Before: SCIRICA, COWEN and GARTH, Circuit Judges.

OPINION OF THE COURT

SCIRICA, Circuit Judge.

In this action, nine associations of construction contractors challenge on equal protection grounds a City of Philadelphia ordinance creating preferences in City contracting for businesses owned by racial and ethnic minorities, women, and handicapped

persons. The district court granted summary judgment to the Contractors, holding they had standing to bring this lawsuit and invalidating the Ordinance in all respects. *Contractors Association v. City of Philadelphia,* 735 F. Supp. 1274 (E.D. Pa. 1990). In an earlier opinion, we affirmed the district court's ruling on standing but vacated summary judgment on the merits because the City had outstanding discovery requests. *Contractors Association v. City of Philadelphia,* 945 F.2d 1260 (3d Cir. 1991). On remand after discovery, the district court again entered summary judgment for the Contractors. We will affirm in part, vacate in part, and reverse in part.

I.

Facts and Procedural History

A.

In 1982, the Philadelphia City Council enacted an ordinance to increase participation in City contracts by minority-owned and women-owned businesses. Phila. Code § 17-500. In its present form,[1] the Ordinance establishes "goals" for the participation of "disadvantaged business enterprises." § 17-503. "Disadvantaged business enterprises" (DBEs) are defined as those enterprises at least 51 percent owned by "socially and economically disadvantaged individuals," defined in turn as:

> those individuals who have been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their

1. The Ordinance was amended in 1987 and in 1988.

> handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.

§ 17-501(11). The Ordinance further provides that racial minorities and women are rebuttably presumed to be socially and economically disadvantaged individuals, § 17-501(11)(a), but that a business which has received more than $5 million in City contracts, even if owned by such an individual, is rebuttably presumed not to be a DBE, § 17-501(10).

The Ordinance sets goals for participation of DBEs in city contracts: 15 percent for minority-owned businesses, 10 percent for women-owned businesses, and 2 percent for businesses owned by handicapped persons. § 17-503(1). The Ordinance applies to all City contracts, which are divided into three types — vending, construction, and personal and professional services. § 17-501(6). The percentage goals relate to the total dollar amounts of City contracts and are calculated separately for each category of contracts and each City agency. § 17-503(1).

To implement the program, the Ordinance established a Minority Business Enterprise Council and authorized it to promulgate regulations to ensure the goals are met by city agencies in awarding prime contracts and by private contractors in awarding subcontracts. § 17-504(2)(e), (f), (i). The Ordinance specifies that, in developing regulations, the Council must consider: including DBEs on solicitation lists, assuring DBEs are solicited whenever they are potential contractors, structuring contract requirements to permit maximum participation by

DBEs, and "investigating and making recommendations concerning the use of the Sheltered Market process, under which contracts would be set-aside so that only DBEs could bid for them" § 17-504(2)(f). The regulations provide that "the contractor's efforts to meet [the] goals shall be considered an element of responsiveness to the bid," and require each contractor to submit a "Schedule for Participation" of DBEs in the contract at issue or to request a waiver if the contractor is unable to meet the goals after a good faith effort. Regulations § 6.1.

The Ordinance also directed the Council to (1) develop a certification procedure for DBEs to prevent fraudulent of "front" DBEs from abusing the program, § 17-504(2)(a); (2) grant exemptions for individual contracts or classes of contracts where there is "an insufficient number of DBEs . . . to ensure adequate competition and an expectation of reasonable prices on bids," § 17-505(1); (3) grant waivers to contractors who are unable to meet the percentage goals after a good faith effort, as determined by the Council, § 17-505(3); (4) "recommend contractual language which provides that compliance with DBE participation requirements is material to the City contract," § 17-504(2)(h); and (5) develop and recommend remedies, including but not limited to, termination of the contract in the event a contractor fails to comply with the program, § 17-506(a).

B.

On April 14, 1989, nine contractors associations brought suit in the Eastern District of Pennsylvania against the City of Philadelphia and two city officials, challenging the Ordinance as a facial violation of the Equal Protection Clause of the

Fourteenth Amendment.[2] United Minority enterprise Associates, inc. (UMEA) intervened as a defendant. After the city moved for judgment on the pleadings contending the Contractors lacked standing, the Contractors moved for summary judgment on the merits.

The district court granted the Contractors' motion. It ruled the Contractors had standing, based on affidavits of individual association members alleging they had been denied contracts for failure to meet the DBE goals despite being low bidders. 735 F. Supp. at 1283 & n. 3. Turning to the merits of the Contractors' equal protection claim, the district court held that *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989), required it to apply the strict scrutiny standard to review the sections of the Ordinance creating a preference for minority-owned businesses. Under that standard, a law will be invalidated if it is not "narrowly tailored" to a "compelling government interest." *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 274, 106 S. Ct. 1842, 1847, 90 L. Ed. 2d 260 (1986). Applying *Croson*, the district court struck down the Ordinance because the City had failed to adduce sufficiently specific evidence of past racial discrimination against minority construction contractors in Philadelphia to establish a "compelling government interest." 735 F. Supp. at 1295-98. The court also held the Ordinance was not "narrowly tailored," emphasizing the City had not considered using race-neutral means to increase minority participation in City contracting and had failed to articulate a rationale for choosing 15 percent as the goal for minority participation. *Id.* at 1298-99. The court

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2. The Contractors also asserted other federal statutory claims and two claims under the Pennsylvania Constitution, but the district court ruled only on the federal constitutional claim, and that is the only claim we consider.

held the Ordinance's preferences for businesses owned by women and handicapped persons were similarly invalid under the less rigorous intermediate scrutiny and rational basis standards of review. *Id.* at 1299-1309.

On appeal, we affirmed the district court's ruling on standing but vacated its judgment on the merits as premature because the Contractors had not responded to certain discovery requests at the time the court ruled. 945 F.2d 1260 (3d cir. 1991). We remanded so discovery could be completed and explicitly reserved judgment on the merits. *Id.* at 1268. On remand, all parties moved for summary judgment, and the district court reaffirmed its prior decision, holding discovery had not produced sufficient evidence of discrimination in the Philadelphia construction industry against businesses owned by racial minorities, women, and handicapped persons to withstand summary judgment. The City and UMEA appeal.[3]

II.

This appeal presents three sets of questions: whether and to what extent the Contractors have standing to challenge the Ordinance, which standards of equal protection review govern the different sections of the Ordinance, and whether these standards justify invalidation of the Ordinance in whole or in part. We will address these issues in turn.

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3. The district court had federal question jurisdiction, 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291 and exercise plenary review over the court's grant of summary judgment. *Sacred Heart Med. Ctr. v. Sullivan*, 958 F.2d 537, 543 (3d Cir. 1992).

Appendix D

III.

Standing

A. *General Principles*

Our standing inquiry has two parts: whether the Contractors have standing to challenge the Ordinance at all, and if so, whether they have standing to challenge all or just part of the Ordinance. Prior to this appeal, the parties contested only the first of these issues. In our earlier opinion, we affirmed the district court's holding that four of the nine associations had standing to challenge the Ordinance because the affidavits submitted by their members allege injury with sufficient particularity, and because the associations satisfied the standards for associational standing. 945 F.2d at 1264-66.

The Supreme Court has since confirmed that construction contractors have standing to challenge a minority preference ordinance upon a showing they are "able and ready to bid on contracts [subject to the ordinance] and that a discriminatory policy prevents [them] from doing so on an equal basis." *Northeastern Fla. Chapter of the Associated Gen. Contractors of America v. City of Jacksonville*, __ U.S. __, __, 113 S. Ct. 2297, 2303, 124 L. Ed. 2d 586 (1993). Because the affidavits submitted to the district court establish the Contractors were able and ready to bid on construction contracts but could not do so for failure to meet the DBE percentage requirements, they have standing to challenge the sections of the Ordinance covering construction contracts.[4]

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4. The city urges us to reverse our earlier ruling on standing on two of the associations because subsequent evidence reveals their affiants no longer

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B. *Scope of the Issues*

We next consider whether the Contractors have standing to challenge the entire Ordinance or only the provisions relating to construction contracts. Because standing seeks to ensure a party has a "personal stake in the controversy," *Harris v. McRae*, 448 U.S. 297, 320, 100 S. Ct. 2671, 2690, 65 L. Ed. 2d 784 (1980), courts typically only allow a party to raise his own rights rather than the rights of others, *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 2916, 37 L. Ed. 2d 830 (1973). This doctrine sensibly enables a court to "avoid[ ] . . . adjudication of rights which those not before the court may not wish to assert, and assur[es] that the most effective advocate of the rights at issue is present to champion them," *Duke Power Co. v. Carolina Environ. Study Group*, 438 U.S. 59, 80, 98 S. Ct. 2620, 2634, 57 L. Ed. 2d 595 (1978). Allowing parties only to litigate their own rights is especially important in constitutional actions because the Supreme Court cautions "never to anticipate a question of constitutional law in advance of the necessity of deciding it [and] never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *United States v. Raines*, 362 U.S. 17, 21, 80 S. Ct. 519, 522, 4 L. Ed. 2d 524 (1960) (quoting *Liberpool, New York*

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have standing, one because he is in liquidation and the other because he is no longer a member of the association. The Contractors maintain our prior ruling on standing is law of the case. We need not resolve this dispute in view of *Northeastern Florida* and because it is undisputed that the remaining two associations have standing. *U.S. Dept. of Labor v. Triplett*, 494 U.S. 715, 719, 110 S. Ct. 1428, 1431, 108 L. Ed. 2d 701 (1990); *Montalvo-Huertas v. Rivera-Cruz*, 885 F.2d 971, 976 (1st Cir. 1989) ("[w]here coplaintiffs have a shared stake in the litigation, . . . the finding that one has standing to sue renders it superflous to adjudicate the other plaintiffs' standing.").

& Philadelphia S.S. Co. v. Commrs. of Emigration, 113 U.S. 33, 39, 5 S. Ct. 352, 355, 28 L. Ed. 899 (1885)).

1. *Severability of the Ordinance*

Courts considering constitutional challenges to statutes often analyze standing problems in terms of the severability doctrine. Under this Principle, when a court determines the legislature intended the challenged sections of a statute to operate independently of the unchallenged sections and finds these sections can so operate, it will consider only the challenged sections, leaving the remainder of the statute intact. *See United States v. Raines,* 362 U.S. at 23, 80 S. Ct. at 523-24; 13 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3531.9, at 585 (2d ed. 1984). Severing statutes to limit standing promotes the twin goals of avoiding unnecessary constitutional adjudication and sharpening the presentation of the issues. *Singleton v. Wulff,* 428 U.S. 106, 113-114, 96 S. Ct. 2868, 2873-74, 49 L. Ed. 2d 826 (1976).[5]

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5. *H.L. v. Matheson,* 450 U.S. 398, 101 S. Ct. 1164, 67 L. Ed. 2d 388 (1981), illustrates this approach. There, a minor woman challenged the constutionality of a Utah statute which required a physician to notify the parents or guardian of a minor woman who sought an abortion. *Id.* at 400, 101 S. Ct. at 399. H.L. claimed the ordinance was overbroad because it could be applied "to all unmarried minor girls, including those who are mature and emancipated." *Id.* at 405, 101 S. Ct. at 1169. Noting H.L. was neither mature nor emancipated, the Court held she lacked standing to raise the interests of such women and accordingly refused to consider this claim. *Id.* at 407, 101 S. Ct. at 1170.

Courts of Appeals have also severed statutes to limit plaintiffs' standing to raise constitutional challenges. *See Joyner v. Mofford,* 706 F.2d 1523, 1527 (9th Cir.) (elected member of county Board of Supervisors had standing only

(Cont'd)

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The severability doctrine governs whether the Contractors have standing to challenge the entire Ordinance, or just those provisions of the Ordinance affecting the construction industry. As we have noted, the Contractors only have a personal interest in obtaining construction contracts because these are the only types of contracts they are "ready and able" to bid on within the meaning of *Northeastern Florida*, __ U.S. at __, 113 S. Ct. at 2303. The Contractors do not dispute this fact but contend they should be allowed to challenge the Ordinance in its entirety, because the construction provisions are inseverable from the remainder of the statute.

Because "[s]everability of a local ordinance is a question of state law," *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 772, 108 S. Ct. 2138, 2152, 100 L. Ed. 2d 771 (1988), we look to Pennsylvania law in determining whether the Ordinance is severable. As evidenced by its general severability provision, 1 Pa. Cons. Stat. Ann. § 1925 (Supp. 1991), Pennsylvania law favors severability. *Commonwealth Dept. of Educ. v. First School*, 471 Pa. 471, 478, 370 A.2d 702, 705 (1977).[6] Additionally, there is a presumption in favor of

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to challenge application of Arizona statute barring salaried officeholders from running for elections to other elected Supervisors), *cert. denied*, 464 U.S. 1002, 104 S. Ct. 509, 78 L. Ed. 2d 698 (1983); *United States v. Lemons*, 697 F.2d 832, 837 (8th Cir.1983) (homosexual convicted of sodomy in a public place under Arkansas statute had no standing to challenge statute on the ground it could not constitutionally be applied in a private place).

6. The Philadelphia Code also contains a general severability provision. Phila. Code § 1-106.

severability where, as here, the Ordinance contains a specific severability provision. § 17-508.[7]

Equipped with these principles, we must decide whether the Ordinance's provisions on different types of contracts "are distinct and not so interwoven as to be inseparable." *Saulsbury v. Bethlehem Steel Co.*, 413 Pa. 316, 320, 196 A.2d 664 (1964). The *Saulsbury* standard turns largely on functional concerns. Thus, the Pennsylvania Supreme Court severed a statute authorizing financial aid to sectarian and nonsectarian private schools because the statute was "readily capable of being administered along a sectarian-nonsectarian dichotomy." *First School*, 471 Pa. at 479, 370 A.2d at 706. Accordingly, the court held aid could continue to be provided to nonsectarian schools despite the fact that aid to sectarian schools violated the Establishment Clause. *Id.* We applied similar reasoning in severing portions of the Pennsylvania Abortion Control Act in *Planned Parenthood v. Casey*, 978 F.2d 74, 78 (3d Cir. 1992), finding "[t]he basic statutory scheme remains intact and can operate independently of the unconstitutional sections."

In urging the Ordinance is not severable, the Contractors rely on *Wyoming v. Oklahoma*, __ U.S. __, 112 S. Ct. 789, 117 L. Ed. 2d 1 (1992). There, the Supreme Court considered a Commerce Clause challenge to an Oklahoma statute requiring "all entities providing electric power for sale to the consumer in Oklahoma and generating said power from coal-fired plants

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7. § 17-508 states: "[i]f any section, subsection, clause, sentence or phrase of this Chapter is found to be unlawful by reason of other superior laws of the United States or the Commonwealth of Pennsylvania, such a determination shall not affect the validity of the remaining portions of this Chapter."

located in Oklahoma [to] burn a mixture of coal that contains a minimum of ten percent Oklahoma mined coal. . . ." __ U.S. at __ n. 1, 112 S. Ct. at 793 n. 1. The state of Oklahoma urged the Court to construe the statute as constitutional when applied to a state-owned utility under the market participant exception to the Commerce Clause, a ruling that would require severing application of the statute to private utilities. Rejecting this contention, the Supreme Court held:

> there are no parts or separate provisions in the invalid [section] of the Act [because] it applies to "all entities providing electric power for sale to the consumer in Oklahoma" and commands them to purchase 10% Oklahoma-mined coal. Nothing remains to be saved once that provision is stricken. Accordingly, the Act must stand or fall as a whole.

__ U.S. at __, 112 S. Ct. at 803. The Contractors argue *Wyoming* dictates a finding of in severability in this case because, like the statute there, the Ordinance applies to "all city contracts."

In assessing this contention, we look to the language of the Ordinance. The Ordinance provides it applies to: "all types of city contracts," § 17-502(2), and defines "Types of City Contracts" to include: "all city contracts, whether competitively bid or negotiated, according to the following classes: (a) Vending, to include material, equipment, services and supplies; (b) Construction; and (c) Personal and professional services," § 17-501(6).

These provisions reveal the Ordinance differs critically from

the Oklahoma statute at issue in *Wyoming*. Here, the challenged and unchallenged provisions appear in different subsections, containing the "separate provisions" the Supreme Court found lacking in the Oklahoma statute. Also, the severability provision in the Ordinance is broader than that in the Oklahoma statute. The provision there only authorized severence of "any part or provision" of the statute found void, while the Ordinance directs severance of "any section, subsection, clause, sentence or phrase." § 17-508. Because the provisions dealing with non-construction contracts constitute "subsections" of the Ordinance, § 17-508 authorizes severing these provisions.

Moreover, the Ordinance makes clear that severence of the construction provisions would not prevent the non-construction provisions from continuing to operate. It expressly provides that the percentage goals for minority-owned and women-owned businesses, and businesses owned by handicapped persons, shall be "calculated by examining independently each type of City contract for each agency which lets such contracts." § 17-503. This language demonstrates severance is feasible and indicates City Council envisioned the Ordinance would be administered separately for each type of contract. Therefore, we hold the provisions of the Ordinance dealing with construction contracts are severable from the remainder of the Ordinance. Because the Contractors only have a personal stake in the construction contract provisions, we must limit our review to these provisions unless we find the Contractors have standing to assert the rights of other businesses affected by the sections of the Ordinance dealing with the contracts for vending and services.

2. *Third-Party Standing*

In *United States v. Raines*, the Supreme Court delineated

certain situations where a party has "third-party standing" to assert the rights of others. 362 U.S. at 22-23, 80 S. Ct. at 523-24. One such circumstance absent here occurs where the statute is not severable and therefore a party's challenge to the statute necessarily involves assertion of the rights of others affected by the statute. *Id. Raines* also stated third-party standing is appropriate where a third party faces some obstacle in asserting his right, *id.*, an exception also unavailable here. Because we decline to address the constitutionality of the provisions of the Ordinance applicable to non-construction contracts, our ruling will create no precedent that would impede future contractors from challenging the Ordinance in a subsequent action nor otherwise impair their legal rights.[8]

Denial of third-party standing is especially appropriate here, where all parties have proceeded under the shared assumption that this litigation concerns only the construction provisions of

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8. To illustrate this exception, the *Raines* Court cited *NAACP v. Alabama*, 357 U.S. 449, 459, 78 S. Ct. 1163, 1170, 2 L. Ed. 2d 1488 (1958), where it held the NAACP could assert the First Amendment rights of its members to remain anonymous, for requiring the members to intervene would necessarily defeat their anonymity, and *Barrows v. Jackson*, 346 U.S. 249, 259, 73 S. Ct. 1031, 1036, 97 L. Ed. 1586 (1953), where it found a white real-estate seller could assert the rights of his black purchaser in defending against a claim the white seller breached a racially restrictive covenant by making the sale because only the white seller was subject to the convenant. These circumstances are absent here. *Raines* also indicated third-party standing is permissible in certain First Amendment cases, where a litigant can assert the speech interests of others to prevent a statute from inhibiting protected speech, in a case where a limiting construction of a criminal statute necessitated by adherence to strict standing rules would render the statute unconstitutionally vague, and where "the statute in question has already been declared unconstitutional in the vast majority of its intended applications." *Id.*, 362 U.S. at 22-23, 80 S. Ct. at 523-24. The present case also falls within none of these exceptions.

the Ordinance. Neither in the district court nor in this Court has any party focused on application of the Ordinance to other types of contracts. Indeed, we remanded the case so defendants could take discovery "that relates to a pattern of discriminatory practices or instances of discrimination in the Philadelphia-area construction industry." 945 F.2d at 1267. Accordingly, no evidence has been presented on other areas of City contracting. To consider application of the Ordinance to these contracts without the benefit of the adversary process would require us to proceed without "data relevant and adequate to an informed judgment." *New York v. Ferber,* 458 U.S. 747, 768, 102 S. Ct. 3348, 3360, 73 L. Ed. 2d 1113 (1982). For these reasons, we hold the Contractors have standing only to challenge the provisions of the Ordinance relating to construction contracts. Accordingly, we will vacate that portion of the district court's order invalidating the remainder of the Ordinance.

IV.

Standards of Equal Protection Review

The Contractors challenge the preferences given by the Ordinance to businesses owned and operated by minorities, women, and handicapped persons. In analyzing these classifications separately, we first consider which standard of equal protection review applies to each classification.

A. *Race, Ethnicity, and Gender*

Choice of the appropriate standard of review turns on the nature of the classification. Because under equal protection analysis classifications based on race, ethnicity, or gender are inherently suspect, they merit closer judicial attention. *City of*

Cleburne v. Cleburn Living Center, Inc., 473 U.S. 432, 440, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313 (1985). Accordingly, we must determine whether the Ordinance contains race- or gender-based classifications. The Ordinance's classification scheme is spelled out in its definition of "socially and economically disadvantaged persons," described as:

> those individuals who have either been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicapped without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. § 17-501(11).

The district court interpreted this definition to apply only to minorities, women, and handicapped persons and viewed the definition's economic criteria as in addition to rather than in lieu of face, ethnicity, gender, and handicap. Therefore, it applied strict scrutiny to the racial preference under *Croson* and intermediate scrutiny to the gender preference under *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724, 102 S. Ct. 3331, 3336, 73 L. Ed. 2d 1090 (1982).[9]

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9. Under strict scrutiny, a law may only stand if it is "narrowly tailored" to a "compelling government interest." *Wygant*, 476 U.S. at 274, 106 S. Ct. at 1846. Under intermediate scrutiny, a law must be "substantially related" to the achievement of "important government objectives." *Hogan*, 458 U.S. at 724, 102 S. Ct. at 3336.

Disputing this analysis, the City contends the two categories, "social disadvantage" (race, gender, or handicap), and "economic disadvantage" (diminished capital and credit opportunities), are disjunctive, so that a contractor who can satisfy either category qualifies as "socially and economically disadvantaged." Accordingly, the City continues, we should apply rational basis review to the Ordinance rather than strict or intermediate scrutiny because race and gender are only two criteria for determining whether a contractor is a DBE but are not prerequisites to that determination.

We agree with the district court that the definition of "socially and economically disadvantaged individuals" includes only individuals who are both victims of prejudice based on status and economically deprived. This is the only reasonable interpretation and is dictated by the conjunctive phrase "socially *and* economically disadvantaged," as well as the use of the word "and" connecting the descriptions of each category of disadvantage. § 17-502(11) ("individuals subject to . . . prejudice because of their identity as a member of a group . . . *and* whose ability to compete in the free enterprise system has been impaired . . ") (emphasis added). Additionally, the last clause of the definition describes economically disadvantaged individuals as those "whose ability to compete in the free enterprise system has been impaired . . . as compared to others . . . who are not socially disadvantaged." This clause demonstrates the drafters wished to rectify only economic disadvantage that results from social disadvantage, i.e., prejudice based on race, ethnicity, gender, or handicapped status. The plain language of the Ordinance forecloses the City's argument that a white male contractor could qualify for preferential treatment solely on the basis of economic disadvantage.

The City also relies on the affidavit of Curtis Jones, Executive Director of the Minority Business Enterprise Council, who asserts that "any disadvantaged member of plaintiff organizations . . . [is] eligible for certification as a DBE without regard to their race, gender or physical capability. The [Council] considers economic and social factors in addition to race and gender in determining whether an applicant should be certified as a DBE." App. 123. But Jones' affidavit, which neither explains its interpretation nor has any legal force by itself, cannot overcome the plain language of the Ordinance. The affidavit is also inconsistent with the Council's regulations, which incorporate the Ordinance's definition verbatim. Regulations § 1.3(S).

Additionally, the City seeks to distinguish *Croson* on the ground that the Philadelphia City Council, unlike the Richmond City Council, does not have a Black majority. This distinction comes from *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n. 4, 58 S. Ct. 778, 783-84 n. 4, 82 L. Ed. 1234 (1938), where the Court first suggested heightened scrutiny under the Equal Protection Clause might be appropriate for laws that prejudiced "discrete and insular minorities" because those groups would consistently be outvoted in legislatures and therefore could turn only to the judiciary for help. Under this theory, affirmative action programs typically do not merit heightened scrutiny because they represent examples of a white majority burdening itself. *Croson*, 488 U.S. at 496-97, 109 S. Ct. at 723-24 (citing John Hart Ely, *The Constitutionality of Reverse Racial Discrinination*,41 U. Chi. L. Rev. 723, 739 n. 58 (1974)). Logically, such programs are suspect where they are enacted by a "predominantly Black legislature." *See id.* at 497, 109 S. Ct. at 724.

But the *Croson* Court expressly did not rely on the *Carolene Products* theory. In its discussion, the Court stated: "[e]ven were we to accept a reading of the guarantee of equal protection under which the level of scrutiny varies according to the ability of different groups to defend their interests in the representative process, heightened scrutiny would still be appropriate in the circumstances of this case. . . ." 488 U.S. at 495, 108 S. Ct. at 722; *see also O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 424 (D.C. Cir. 1992) ("The outcome in *Croson*, expressed in the portions of the opinion joined by a majority, did not turn on who possessed political power in Richmond"). Therefore, we do not believe the racial makeup of the Philadelphia City Council changes the standard of review in this case.

Even were the Philadelphia City Council comprised of a Black majority, we would not rely on this fact in choosing a standard of review. Application of this theory in a reverse discrimination case, if logical, is a historical; it renders somewhat hollow the promise of racial progress through political power. More generally, the *Carolene Products* theory puts a court in the awkward position of nullifying legislative outcomes based on judges' own assumptions about the political process. And as one commentor has noted, the process of selecting groups as discrete and insular minorities necessarily requires normative judgments about political outcomes, i.e., those groups identified as minorities are those whose interests the court believes are inadequately protected by existing policies. Terrance Sandalow, *The Distrust of Politics*, 56 N.Y.U.L. Rev. 446, 466-67 (1981). Such judgments improperly interfere with the legislative will. For these reasons, we conclude the district court properly applied strict scrutiny to the racial preference in the Ordinance.

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We next consider the proper standard of review for the Ordinance's gender preference. In *Hogan*, the Court held a gender-based classification favoring women merited intermediate scrutiny. 458 U.S. at 728, 102 S. Ct. at 3338. The Ordinance is such a program. Several federal courts have applied intermediate scrutiny to similar gender preferences contained in state and municipal affirmative action contracting programs. *Coral Constr. Co. v. King County*, 491 F.2d 910, 930 (9th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 875, 116 L. Ed. 2d 780 (1992); *Michigan Road Builders Ass'n, Inc. v. Milliken*, 834 F.2d 583, 595 (6th Cir. 1987), *aff'd mem.*, 489 U.S. 1061, 109 S. Ct. 1333, 103 L. Ed. 2d 804 (1989); *Associated General Contractors of Cal. v. City and County of San Francisco*, 813 F.2d 922, 942 (9th Cir. 1987); *Main Line Paving Co. v. Board of Educ.*, 725 F. Supp. 1349, 1362 (E.D. Pa. 1989). Application of intermediate scrutiny to the Ordinance's gender preference also follows logically from *Croson*, which held municipal affirmative action programs benefiting racial minorities merit the same standard of review as that given other race-based classifications. For these reasons, we reject, as did the district court, those cases applying strict scrutiny to gender-based classifications. *Cone Corp. v. Hillsborough County*, 908 F.2d 908 (11th Cir.), *cert. denied*, 498 U.S. 983, 111 S. Ct. 516, 112 L. Ed. 2d 528 (1990); *Conlin v. Blanchard*, 890 F.2d 811, 816 (6th Cir. 1989); *American Subcontractors Ass'n v. City of Atlanta*, 259 Ga. 14, 376 S.E.2d 662 (1989). As the district court noted, 735 F. Supp. at 1302, these cases neither explained their choice of the strict scrutiny standard nor cited any language in *Croson* supporting that choice. Accordingly, we agree with the district court's choice of intermediate scrutiny to review the Ordinance's gender preference.

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B. *Handicap*

The district court reviewed the preference for handicapped business owners under the rational basis test. 735 F. Supp. at 1307. That standard validates the classification if it is "rationally related to a legitimate governmental purpose." *Cleburne,* 473 U.S. at 445, 105 S. Ct. at 3257. In selecting this standard, the district court relied on *Cleburne,* where the Supreme Court rejected an effort to make mentally retarded persons a quasi-suspect class as a potentially limitless exercise which could apply to all groups with "immutable disabilities." *Id.*

The Contractors contend the district court erred in not applying some form of heightened scrutiny to the preference for handicapped individuals. Acknowledging *Cleburne* requires us to apply rational basis review, the Contractors maintain that decision is "obviously contrary to the sense of American society as a whole" given the Americans with Disabilities Act. In that Act, Congress expressly found that "individuals with disabilities are a discrete and insular minority, who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society. . . ." 42 U.S.C. § 12101 (1990). The Contractors maintain the ADA overruled *Cleburne* and requires us to apply heightened scrutiny to the preference for handicapped business owners.

We disagree. The Contractors offer no evidence that the ADA overruled *Cleburne,* and the limited case law is to the contrary. *More v. Farrier,* 984 F.2d 269, 271 n. 4 (8th Cir. 1993) (ADA does not "alter the standard for constitutional equal protection claims"). Moreover, we believe application of

heightened scrutiny to the preference for handicapped business owners would run counter to the ADA, which Congress enacted to reduce discrimination against handicapped persons. 42 U.S.C. § 12101(a)(5)-(9) (Supp. 1990). Therefore, we hold the district court properly chose the rational basis standard in reviewing the Ordinance's preference for handicapped persons.

V.

Constitutionality of the Ordinance

We now consider the district court's determination to invalidate the Ordinance in all respects.

A. *Race and Ethnicity*

1. *Compelling Government Interest*

Because strict scrutiny applies to the Ordnance's racial and ethnic preferences, we may only uphold them if they are "narrowly tailored" to a "compelling government interest." *Wygant*, 476 U.S. at 274, 106 S. Ct. at 1847. In *Croson*, the Supreme Court made clear that combatting racial discrimination is a "compelling government interest." 488 U.S. at 492, 509, 109 S. Ct. at 721, 730. It also held a city can enact such a preference to remedy past or present discrimination where it has actively discriminated in its award of contracts or has been a " 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry." *Id.* at 492, 109 S. Ct. at 721.

But in view of the Court's concern about race-based

classifications, *Croson* requires the City to "identif[y] the discrimination with the particularity required by the Fourteenth Amendment." *Id.* In striking down the Richmond ordinance requiring prime construction contractors to subcontract 30 percent of the dollar amount of each contract to minority businesses, the Court emphasized the City's failure to show specific evidence of past discrimination in the Richmond construction industry. 488 U.S. at 498, 109 S. Ct. at 723. It found evidence of prior national discrimination geographically overbroad because "the probative value of these findings for demonstrating the existence of discrimination in Richmond is extremely limited." *Id.* at 504, 109 S. Ct at 727. The Court was similarly unimpressed with data showing the percentage of prime contracts awarded to minority businesses (.67%) was disproportionately low given the percentage of Richmond's population that were minorities (50%), and that very few minorities were members of local construction trade associations. 488 U.S. at 499, 109 S. Ct. at 724. In the Court's view, the "relevant statistical pool" was not the minority population but the number of qualified minority contractors. It stressed the city did not know the number of qualified minority businesses in the area and had offered no evidence of the percentage of contract dollars minorities received as subcontractors. *Id.* at 502, 109 S. Ct. at 726.

Ruling the Philadelphia Ordinance's racial preference failed to overcome strict scrutiny, the district court concluded the Ordinance "possesses four of the five characteristics fatal to the constitutionality of the Richmond Plan," 735 F. Supp. at 1298. As there, the district court reasoned, the City relied on national statistics, a comparison between prime contract awards and the percentage of minorities in Philadelphia's population, the

Ordinance's declaration it was remedial, and "conclusory" testimony of witnesses regarding discrimination in the Philadelphia construction industry. *Id.* at 1295-98.[10]

a. *Anecdotal Evidence of Racial Discrimination*

The City and UMEA contend the district court understated the evidence of prior discrimination available to the Philadelphia City Council when it enacted the 1982 ordinance. The City Council Finance Committee received testimony from at least fourteen minority contractors who recounted personal experiences with racial discrimination. In certain instances, these contractors lost out despite being low bidders. This anecdotal evidence significantly outweighs that presented in *Croson*, where the Richmond City Council heard "no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors." 488 U.S. at 480, 109 S.Ct. at 715.

Although the district court acknowledged the minority contractors' testimony was relevant under *Croson*, it discounted

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10. The district court also interpreted *Croson* to require "specific evidence of systematic prior discrimination in the industry in question by th[e] governmental unit" enacting the ordinance. 735 F. Supp. at 1295. This reading overlooks the statement in *Croson* that a City can be a "*passive participant*" in private discrimination by awarding contracts to firms that practice racial discrimination, and that a city "has a compelling interest in assuring that public dollars . . . do not serve to finance the evil of private prejudice." 488 U.S. at 492, 109 S. Ct. at 721. But we do not believe this error undercuts the court's factual comparisons between the information relied on by the Philadelphia and Richmond City Councils, which is the heart of its analysis.

this evidence because "other evidence of the type deemed impermissible by the Supreme Court . . . unsupported general testimony, impermissible statistics and information on the national set-aside program, . . . overwhelmingly formed the basis for the enactment of the set-aside . . . and therefore taint[ed] the minds of city council members." 735 F. Supp. at 1296.

The district court's approach appears inconsistent with the accepted proposition that "at the summary judgment stage the [trial] judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). Moreover, the court offered only a few factual examples of this impermissible evidence but did not attempt to quantify or otherwise explain why the impermissible evidence was dominant and why Council members necessarily attached more weight to this evidence than to the permissible evidence.

Yet given *Croson*'s emphasis on statistical evidence, even had the district court credited the City's anecdotal evidence, we do not believe this amount of anecdotal evidence is sufficient to satisfy strict scrutiny. *See Coral Constr.*, 941 F.2d at 919 ("anecdotal evidence . . . rarely, if ever, can . . . show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan."). Although anecdotal evidence alone may, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson*, it is insufficient here. But because the combination of "anecdotal and statistical evidence is potent," *Coral Constr.*, 941 F.2d at 919, we turn to the statistical evidence proffered in support of the Ordinance.

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b. *Statistical Evidence of Racial Discrimination*

There are two categories of statistical evidence here, evidence undisputedly considered by City Council before it enacted the Ordinance in 1982 (the "pre-enactment" evidence), and evidence developed by the City on remand (the "post-enactment" evidence).

i. *Pre-Enactment Statistical Evidence*

The principal pre-enactment statistical evidence appears in the 1982 Report of the City Council Finance Committee and recites that minority contractors were awarded only .09 percent of City contract dollars during the preceding three years, 1979 through 1981, although businesses owned by Blacks and Hispanics accounted for 6.4 percent of all businesses licensed to operate in Philadelphia.[11] These statistics do not satisfy *Croson* because they do not indicate what proportion of the 6.4 percent of minority-owned businesses were available or qualified to perform City construction contracts. Under *Croson*, available minority-owned businesses comprise the "relevant statistical pool." 488 U.S. at 501, 109 S. Ct. at 726.[12] Therefore, the data

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11. In numerical terms, this data showed that the 4,418 Black-owned firms and 199 Hispanic-owned firms and an unspecified number of firms owned by members of other minority groups received only $177,000 of the $240 million in City contracts awarded during the years 1979 through 1981. We note that the number of Black- and Hispanic-owned firms represents data from 1977, rather than 1979 or 1981.

12. A law professor who assisted in drafting the Ordinance, conceded in his testimony to the Finance Committee in 1982 that the City lacked this data. We believe the district court properly relied on this concession in finding the evidence inadequate.

in the Finance Committee Report do not provide a sufficient evidentiary basis for the Ordinance.

ii. *Post-Enactment Statistical Evidence*

The "post-enactment" evidence consists of a study conducted by economic consultant Andrew Brimmer to demonstrate the disproportionately low share of public and private construction contracts awarded to minority-owned businesses in Philadelphia. Brimmer's study provides the "relevant statistical pool" needed to satisfy *Croson* — the percentage of minority businesses engaged in the Philadelphia construction industry.[13]

As a threshold matter, we are not certain the Brimmer study is post-enactment evidence. The study uses statistics for the three years immediately preceding enactment of the Ordinance. As the Contractors concede, "the data used by Brimmer respecting MBE participation as prime contractors to the City prior to 1982 was before City Council when it enacted § 17-500. Brimmer's simple mathematical conclusions respecting that data obviously were apparent to City Council at that time." Contractors Br. at 28. But because we cannot be certain the Brimmer study constituted pre-enactment evidence, we consider whether it was admissible as post-enactment evidence. The district court considered the evidence, but believed it insufficient to change the result. Accordingly, it did not comment on its pre-or post-enactment character.

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13. The study also presents data showing that minority subcontractors were underrepresented in the private sector construction market. This data may be relevant if at trial the City and UMEA can link it to discrimination occurring in the public sector construction market because the Ordinance covers subcontracting.

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Several courts have held post-enactment evidence is admissible in determining whether an Ordinance satisfied *Croson. Coral Constr.*, 941 F.2d at 921; *Harrison & Burrowes Bridge Constr. v. Cuomo*, 981 F.2d 50, 60 (2d Cir. 1992); *Concrete Works of Colorado, Inc. v. City and County of Denver*, 823 F. Supp. 821, 836-37 (D.Colo. 1993). As the Court of Appeals for the Ninth Circuit explained in *Coral Constr.*, were post-enactment evidence inadmissible, "a municipality having [some] evidence would face the dilemma of deciding whether to wait the months necessary for further development of the record, risking constitutional culpability [to Blacks] due to its inaction, or to act and to risk liability [to Whites] for acting prematurely but otherwise justifiably." 941 F.2d at 921; *see also Wygant*, 476 U.S. at 291, 106 S. Ct. at 1856 (O'Connor, J., concurring) ("public employers are trapped between the competing hazards of liability to minorities if affirmative action is not taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action is taken").

Consideration of post-enactment evidence is especially appropriate here, where the principal relief sought and the only relief granted by the district court, was an injunction. Because injunctions are prospective only, it makes sense to consider all available evidence before the district court, including the post-enactment evidence, which the district court did. Although we recognize the risk of insincerity associated with post-enactment evidence, we believe that risk is minimal here because the Brimmer study consists essentially of an evaluation and re-ordering of pre-enactment evidence — contracts awarded to minority-owned businesses in the three years preceding the Ordinance. For these reasons, we hold the Brimmer affidavit and study were admissible evidence.

c. *Sufficiency of the Evidence*

We now consider whether the statistical evidence, when combined with the anecdotal evidence, was sufficient to enable the racial preference in the Ordinance to survive summary judgment. The district court believed it was not, stating in its opinion on remand that the City's "additional discovery has not produced any evidence which would cause the court to reconsider its prior ruling."

At least three Courts of Appeals have considered the type and amount of statistical data needed to support a municipal race-based contract preference program after *Croson. Associated Gen. Contractors of California v. Coalition for Economic Equity,* 950 F.2d 1401 (9th Cir. 1991) (upholding program), *cert. denied,* __ U.S. __, 112 S. Ct. 1670, 118 L. Ed. 2d 390 (1992); *Cone Corp. v. Hillsborough County, Fla.,* 908 F.2d 908 (11th Cir.) (reversing summary judgment for contractors challenging program), *cert. denied,* 498 U.S. 983, 111 S. Ct. 516, 112 L. Ed. 2d 528 (1990); *O'Donnell Constr. Co. v. District of Columbia,* 963 F.2d 420 (D.C. Cir. 1992) (striking down program).

In both *Cone* and *AGC of California,* where the courts refused to strike down the ordinances, the city and county presented the type of statistics *Croson* indicated were most probative — data showing minority contractors received a disproportionately low share of contracts given their representation in the total contractor population. *Cone,* 908 F.2d at 915, *AGC,* 950 F.2d at 1414; *see also Concrete Works,* 823 F. Supp. 821 (granting summary judgment to city based largely on statistics showing disparity between available minority businesses and contracts awarded to minority businesses).

In *O'Donnell*, by contrast, the data were conflicting. The District of Columbia presented statistics that minority-owned contractors were "capable of performing 34 percent of the District's construction work," 963 F.2d at 426, but received only 3.4 percent of the total construction contracts. But other evidence showed minorities received 32.4 percent of repairs and improvement contracts, 32.2 percent of architectural contracts, and 24.5 percent of materials management contracts, data the court believed "cast doubt on the notion that the 3.4 percent figure resulted from agency discrimination." 963 F.2d at 426; *see also Associated Gen. Contractors of Connecticut v. New Haven*, 791 F. Supp. 941, 946 (D. Conn. 1992) (striking down minority contractor program where minority and women-owned businesses received a share of contracts "in proportion to the numbers of firms in existence").

In determining whether the statistical evidence was adequate here, we look to its critical component — the "disparity index." The index consists of the percentage of minority contractor participation in City contracts divided by the percentage of minority contractor availability or composition in the "population" of Philadelphia area construction firms. This equation yields a percentage figure which is then multiplied by 100 to generate a number between 0 and 100, with 100 consisting of full participation by minority contractors given the amount of the total contracting population they comprise.

Other courts considering equal protection challenges to similar ordinances have relied on disparity indices in determining whether *Croson*'s evidentiary burden is satisfied. *Cone Corp.*, 908 F.2d at 916; *AGC of California*, 950 F.2d at 1414; *Concrete Works*, 823 F. Supp. at 834; *see also Stuart v. Roche*, 951 F.2d 446, 451 (1st Cir. 1991) (employing similar statistical data to

uphold affirmative action promotion program in Boston Police Department), *cert. denied*, __ U.S. __, 112 S. Ct. 1948, 118 L. Ed. 2d 553 (1992). Disparity indices are highly probative evidence of discrimination because they ensure that the "relevant statistical pool" of minority contractors is being considered.

The Brimmer study reports a disparity index for City of Philadelphia construction contracts during the years 1979 through 1981 of 4 out of a possible 100. This index is significantly worse than that in other cases where ordinances have withstood constitutional attack. *See Cone Corp.*, 908 F.2d at 916 (10.78 disparity index); *AGC of California*, 950 F.2d at 1414 (22.4 disparity index); *Concrete Works*, 823 F. Supp. at 834 (disparity index "significantly less than" 100); *see also Stuart*, 951 F.2d at 451 (disparity index of 10 in police promotion program); *compare O'Donnell*, 963 F.2d at 426 (striking down ordinance given disparity indices of approximately 100 in two categories).[14] Therefore, we find the disparity index probative of discrimination in City contracting in the Philadelphia construction industry prior to enactment of the Ordinance.

The Contractors contend the Brimmer study is methodologically flawed because it considered only prime contractors and because it failed to consider the qualifications of the minority businesses or their interest in performing City contracts. In short, the Contractors maintain the Brimmer study does not indicate why there is a disparity between available minority contractors and their participation in contracting. The Contractors contend that these objections, without more, entitle them to summary judgment, arguing that under the strict scrutiny

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14. Although not all of these cases explicitly compute disparity indices, each relies on the precentage disparaties to find a pattern of discrimination.

standard they do not bear the burden of proof and therefore need not offer a neutral explanation for the disparity to prevail.

The Contractors misconceive the allocation of the burden of proof in affirmative action cases. The Supreme Court has indicated that "[t]he ultimate burden remains with [plaintiffs] to demonstrate the unconstitutionality of an affirmative action program." *Johnson v. Transport Agency, Santa Clara County,* 480 U.S. 616, 626, 107 S. Ct. 1442, 1449, 94 L. Ed. 2d 615 (1987) (quoting *Wygant,* 476 U.S. at 277-78, 106 S. Ct. at 1848-49). Thus, the Contractors, not the City, bear the burden of proof here.

The *Johnson* Court also explained how the burden of proof operates in an affirmative action case, stating that a challenge by a white employee to an employer's voluntary affirmative action program under Title VII:

> fits readily within the analytical framework set forth in *McDonnell Douglas* [*Corp. v. Green,* 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).] . . . Once a plaintiff established a prima facie case that race or sex has been taken into account . . . the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to plaintiff to prove that [this] justification is pretextual and the plan is invalid. As a practical matter, of course, an employer will generally seek to

> avoid a charge of pretext by presenting evidence in support of its plan. That does not mean, however, . . . that reliance on an affirmative action plan is to be treated as an affirmative defense requiring the employer to carry the burden of proving the validity of the plan. The burden proving its invalidity remains on the plaintiff. 480 U.S. at 626-27, 107 S. Ct. at 1448-49.

Although *Johnson* was a Title VII case involving a public employer's affirmative action hiring program, *Croson* indicated the same approach would apply in a constitutional case involving an affirmative action contracting program. There, the Court stated:

> Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. See *Bazemore v. Friday,* 478 U.S. [385] at 398, 106 S. Ct. [3000] at 3008 [92 L. Ed. 2d 315]; *Teamsters v. United States,* 431 U.S. [324] at 337-339, 97 S. Ct. [1843] at 1856 [52 L. Ed. 2d 396]. . . . Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified. See

Teamsters, 431 U.S. at 338, 97 S. Ct. at 1856, 488 U.S. at 509 [109 S. Ct. at 730].

This language demonstrates that where a city defends an affirmative action ordinance as a remedy for past discrimination, issues of proof are handled as they are in other cases involving a pattern or practice of discrimination. *Croson*'s reference to an "inference of discriminatory exclusion" based on statistics, as well as its citation to *Bazemore* and *Teamsters*, both Title VII pattern cases, supports this interpretation. Additionally, in *Johnson*, a Title VII case, the Court explicitly looked to the constitutional standard, stating the plaintiff bears the burden in such a case, and "we see no basis for a different rule regarding a plan's alleged violation of Title VII." 480 U.S. at 626, 107 S. Ct. at 1448. We, too, have indicated statistical proof of discrimination is handled similarly under Title VII and equal protection principles. *Newark Branch, NAACP v. Town of Harrison, N.J.*, 940 F.2d 792, 807 (3d Cir. 1991).

Courts of Appeals considering challenges to affirmative action plans under Title VII have indicated that where the plan's proponent adduces evidence supporting an inference of discrimination, the plaintiff must rebut that inference to prevail. Thus, upholding a consent decree establishing an affirmative action program for the Omaha, Nebraska Police Department, the Court of Appeals for the Eighth Circuit directed a verdict for the city where a white police officer "did not present evidence to rebut the City's showing that the plan was remedial and a response to a racial imbalance," based on the disproportionately small percentage of blacks hired by the department. *Donaghy v. City of Omaha*, 933 F.2d 1448, 1460 (8th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 938, 117 L. Ed. 2d 109 (1992); *see also Stuart*, 951 F.2d at 451; *Howard v. McLucas*, 871

F.2d 1000, 1007 (11th Cir. 1989) (both upholding similar consent decrees against reverse discrimination challenges), *cert. denied,* 493 U.S. 1002, 110 S. Ct. 560, 107 L. Ed. 2d 555 (1989).

The Supreme Court has also offered guidance on the quantum of evidence needed to rebut statistical proof of discrimination. In *Bazemore v. Friday,* 478 U.S. 385, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986), it suggested the approach taken by the Contractors here does not suffice. Reversing a verdict for defendants in a Title VII case, the court expressed disapproval with defendants "strategy at trial," noting they "declare[d] simply that many factors go into making up an individual employee's salary [but] made no attempt . . . statistical or otherwise — to demonstrate that when these factors were properly organized and accounted for there was no significant disparity between the salaries of blacks and whites." 478 U.S. at 403 n. 14, 106 S. Ct. at 3010 n. 14.

As the Court of Appeals for the District of Columbia has observed, "[i]mplicit in the *Bazemore* holding is the principle that a mere conjecture or assertion . . . that some missing factor would explain the existing disparities . . . generally cannot defeat the inference of discrimination created by . . . statistics." *Palmer v. Shultz,* 815 F.2d 84, 101 (D.C. Cir. 1987); *see also Catlett v. Missouri Highway & Transport Comm'n,* 828 F.2d 1260, 1266 (8th Cir. 1987) (relying on *Palmer* and *Bazemore* to uphold judgment in sex discrimination case), *cert. denied,* 485 U.S. 1021, 108 S. Ct. 1574, 99 L. Ed. 2d 889 (1988); *Concrete Works,* 823 F. Supp. at 839-40 (relying on these decisions to uphold Denver minority contracting preference ordinance).

Under these holdings, the City's statistical evidence has created an inference of discrimination which the Contractors

would have to rebut at trial either by proving a "neutral explanation" for the disparity, "showing the statistics are flawed, . . . demonstrating that the disparities shown by the statistics are not significant or actionable, . . . or presenting contrasting statistical data." *Coral Constr.*, 941 F.2d at 921. A *fortiori*, this evidence is sufficient for the City to withstand summary judgment. Fed. R. Civ. P. 56 only requires them to establish a genuine issue of fact for trial.[15] Indeed, as the Ninth Circuit concluded in *Coral Constr.*, the Contractors' objections to the study are properly presented to the trier of fact. 941 F.2d at 921 (reversing summary judgment to enable contractors to attack statistics). Accordingly, we believe the City's statistical evidence established a prima facie case of racial discrimination in the award of City of Philadelphia construction contracts.

Consistent with strict scrutiny, we must examine the data for each minority group contained in the Ordinance. The Ordinance applies to businesses owned by persons who are "Black, Hispanic, Asian-American, or Native American." § 17-501(1)(a)-(d). The Census data on which the Brimmer study relies demonstrates that in 1982, the year the Ordinance was enacted, there were construction firms owned in Philadelphia by Blacks, Hispanics, and Asian-Americans, but not Native Americans.[16] Therefore, neither the City nor prime contractors

15. *Croson* itself did not directly consider application of strict scrutiny at the summary judgment stage, because the district court denied cross-motions for summary judgment and held a full bench trial. *See Croson*, 779 F.2d 181, 182 (4th Cir. 1985). But other cases firmly support our result. *Coral Constr.*, 941 F.2d at 921; *Cone Corp.*, 908 F.2d at 917 (both reversing summary judgment for trials to resolve disputes concerning statistical evidence).

16. The report indicates there were no construction firms owned by "American Indians" or "Alaskan Natives" in Philadlephia in 1982. It listed

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could have discriminated against construction companies owned by Native Americans at the time of the Ordinance and we affirm summary judgment as to them.

The Census Report indicates there were 12 construction firms owned by Hispanic persons, 6 firms owned by Asian-American persons, 3 firms owned by persons of Pacific Islands descent, and 1 other minority-owned firm.[17] The Brimmer study calculates Hispanic firms represented .15% of the available firms and Asian-American, Pacific-Islander, and "other" minorities represented .12% of the available firms, and that these firms received no City contracts during the years 1979 through 1981. We do not believe these numbers are large enough to create a triable issue of discrimination. The mere fact that .27 percent of City construction firms—the percentage of all of these groups combined—received no contracts does not rise to the "significant statistical disparity" *Croson* requires. 488 U.S. at 509, 109 S.Ct. at 730.

Nor does it appear that there was any anecdotal evidence

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one firm owned by an "other minority" at that time. At oral argument, UMEA contended the "other minority" was a Native America. But this is contradicted both by the existence of a separate category for American Indians and Alaskan Natives, and by the fact that in another section of the Census Report, "other minority" is defined as "persons of Hispanic ethnicity who reported their race as other than White or Black." U.S. Department of Commerce, Bureau of the Census, *1982 Survey of Minority-Owned Business Enterprises: Asian-Americans, American Indians, and Other Minorities* 2 (1982).

17. We consider these three categories together under the rubric of "Asian American" persons, which the Ordinance defines as persons "having origins in any of the original peoplesof the Far East, Southeast Asia, the Indian Subcontinent or the Pacific Islands." § 17-501(1)(d).

of discrimination against construction businesses owned by people of Hispanic or Asian-American descent. The district court found "there is no evidence whatsoever in the legislative history of the Philadelphia Ordinance that an American Indian, Eskimo, Aleut or Native Hawaiian has ever been discriminated against in the procurement of city contracts," 735 F. Supp. at 1299, and neither the City's nor UMEA's briefs call our attention to any witnesses who were members of these groups or who were Hispanic.

We recognize that the small number of Philadelphia-area construction businesses owned by Hispanic or Asian-American persons does not eliminate the possibility of discrimination against these firms. The small number itself may reflect barriers to entry caused in part by discrimination. But plausible hypotheses are not enough to satisfy strict scrutiny, even at the summary judgment stage. Because these groups appear in different subsections of § 17-501 of the Ordinance, §§ 17-501(b)-(d), in accordance with our earlier discussion of standing, we sever these subsections of the Ordinance. *See American Subcontractors Ass'n, v. City of Atlanta*, 376 S.E. 2d at 666 n. 7 (upholding severance of set-aside ordinance as to racial groups other than Blacks because there was no evidence of discrimination against these groups). Nothing in our decision prevents the City from re-enacting a preference for construction firms owned by Hispanic, Asian-American, or Native American persons based on more concrete evidence of discrimination. In sum, we believe the City and UMEA adduced enough evidence of racial discrimination against Blacks in the award of City construction contracts to withstand summary judgment on the compelling government interest prong of the *Croson* test.

Appendix D

2. *Narrowly Tailored*

We next decide whether the Ordinance's racial preference was "narrowly tailored" to the compelling government interest of eradicating racial discrimination in the award of City construction contracts. *Croson* held this inquiry turns on four factors: (1) whether the city has first considered and found ineffective "race-neutral measures," such as enhanced access to capital and relaxation of bonding requirements, (2) the basis offered for the percentage selected, (3) whether the program provides for waivers of the preference or other means of affording individualized treatment to contractors, and (4) whether the Ordinance applies only to minority businesses who operate in the geographic jurisdiction covered by the Ordinance. 488 U.S. at 507-08, 109 S. Ct. at 729-30.

Holding the Ordinance was not "narrowly tailored," the district court believed the Ordinance failed to satisfy most of these criteria. It stated City Council had not considered race-neutral measures, stressed the testimony of a City Council member that the 15 percent number was arbitrarily chosen, and inferred that testimony regarding "front" minority businesses reflected there were not enough legitimate minority enterprises to meet the percentage requirement and therefore that it was too high. 735 F. Supp. at 1298-99.

On appeal, the City contends it enacted the Ordinance only after race-neutral alternatives proved insufficient to improve minority participation in City contracting. It relies on the affidavits of City Council President Joseph Coleman and former Philadelphia Urban Coalition General Counsel Oscar Gaskins who testified regarding the race-neutral precursors of the Ordinance—the Philadelphia Plan, which set goals for

employment of minorities on public construction sites, and the Urban Coalition's programs, which included such race-neutral measures as a revolving loan fund, a technical assistance and training program, and bonding assistance efforts. We believe the information in these affidavits sufficiently establishes the City's prior consideration of race-neutral programs to withstand summary judgment.[18] *See Concrete Works*, 823 F. Supp. at 841 (relying on similar approaches to conclude program was narrowly tailored).

Unlike the Richmond Ordinance, the Philadelphia Ordinance provides for several types of waivers of the fifteen percent goal. It exempts individual contracts or classes of contracts from the Ordinance where there are an insufficient number of available minority-owned businesses "to ensure adequate competition and an expectation of reasonable prices on bids or proposals," § 17-505(1), (2), and allows a prime contractor to request a waiver of the fifteen percent requirement where the contractor shows he has been unable after "a good faith effort to comply with the goals for DBE participation," § 17-505(3). Furthermore, as the district court noted, the Ordinance eliminates from the program successful minority businesses—those who have won $5 million in city contracts. Also unlike the Richmond program, the City's program is geographically targeted to Philadelphia businesses, as waivers and exemptions are permitted where there exist an insufficient number of MBEs "within the Philadelphia Standard Metropolitan Statistical Area." § 17-505(1), (2).

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18. We disagree with the district court's assumption that City Council's consideration of race-neutral measures must be contemporaneous with enactment of the Ordinance. A legislative body does and should draw on past experience in formulating public policy.

Other courts have found these targeting mechanisms significant in concluding programs are narrowly tailored. *See Cone Corp.*, 908 F.2d at 917; *Associated Gen. Contractors of Cal. v. City and County of San Francisco*, 748 F. Supp. 1443, 1454 (N.D. Cal. 1990), *aff'd*, 950 F.2d 1401 (9th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 1670, 118 L. Ed. 2d 390 (1992); *compare Croson*, 488 U.S. at 508, 109 S. Ct. at 729 ("Richmond's waiver system . . . makes no inquiry into whether or not the particular MBE seeking a preference has suffered from the effects of past discrimination by the city or prime contractors").

A closer question is presented by the Ordinance's fifteen percent goal. The City's data demonstrated that, prior to the Ordinance, only 2.4 percent of available construction contractors were minority-owned. We do not believe the goal must correspond precisely to the percentage of available contractors. Indeed, *Croson* does not impose this requirement, as the Court stated only that Richmond's 30 percent goal inappropriately assumed "minorities [would] choose a particular trade in lockstep proportion to their representation in the local population." 488 U.S. at 507, 109 S. Ct. at 729. Furthermore, imposing a fifteen percent goal for each contract may reflect the need to account for those contractors who receive a waiver because insufficient minority businesses are available, and the contracts exempted from the program. And given the strength of the Ordinance's showing with respect to other *Croson* factors, we conclude the City has created a dispute of fact on whether the minority preference in the Ordinance is "narrowly tailored."

For these reasons, we will reverse the district court's grant of summary judgment to the extent it invalidated application of the construction contract provisions to businesses owned by Black persons.

Appendix D

B. *Gender*

Under the intermediate scrutiny standard, the gender preference is valid if it was "substantially related to an important governmental objective." In striking down the gender preference, the district court found insufficient comparisons between the percentage of city businesses owned by women and the percentage of contracts awarded to women-owned businesses. It also relied on testimony before City Council suggesting the preference was solely the product of political compromise.

The City contends the gender preference is aimed at the "important government objective" of remedying economic discrimination against women, and that the ten percent goal is substantially related to this objective. In assessing this argument, we note that "[i]n the context of women-business enterprise preferences, the two prongs of this intermediate scrutiny test tend to converge into one." *Coral Constr.*, 941 F.2d at 931. At bottom, we can uphold the construction provisions of this program if the City has established a sufficient factual predicate for the claim that women-owned construction businesses have suffered economic discrimination and the ten percent gender preference is an appropriate response.[19]

Few cases have considered the evidentiary burden needed to satisfy intermediate scrutiny in this context and there is no *Croson* analogue to provide a ready reference point. In particular, it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical

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19. As with the racial preference, we consider only the gender preference for construction contracts.

evidence is necessary. The Supreme Court gender-preference cases are inconclusive. The Court has never squarely ruled on the necessity of statistical evidence of gender discrimination. And its decisions are difficult to reconcile on the point. The Court has upheld gender preferences where no statistics were offered, *Schlesinger v. Ballard*, 419 U.S. 498, 508-09, 95 S. Ct. 572, 577-78, 42 L. Ed. 2d 610 (1975) (preferential employment treatment for women military officers), struck down gender preferences despite the presence of statistics, *Craig v. Boren*, 429 U.S. 190, 203-04, 97 S. Ct. 451, 460-61 (1976) (statute allowing 18 year old women but only 21 year old men to purchase 3.2% beer), *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645, 95 S. Ct. 1225, 1231-32, 43 L. Ed. 2d 514 (1975) (statute allowing survivors' benefits for widows but not widowers), and also decided cases both ways by relying in part on statistics, *Hogan*, 458 U.S. at 728, 102 S. Ct. at 3338 (striking down female-only nursing school), *Califano v. Webster*, 430 U.S. 313, 318 & n. 5, 97 S. Ct. 1192, 1195 & n. 5, 51 L. Ed. 2d 360 (1977) (upholding federal statute allowing women to eliminate more low-earning years from calculation of their retirement benefits than men).

Lower court cases are similarly diverse. In *Coral Constr.*, 941 F.2d at 933, the Ninth Circuit emphasized a single, albeit lengthy, affidavit from a woman business owner in affirming summary judgment upholding a contract preference ordinance, although the court elsewhere noted three affidavits had been presented, *id.* at 917-18. Yet in *AGC of California*, the same court, relying on *Hogan*, upheld a general challenge to a gender preference in San Francisco's contracting ordinance but expressly left open the possibility of a future challenge regarding application of the ordinance "to an industry where women are not disadvantaged." 813 F.2d at 942. Additionally, two circuits

are divided over whether evidence of governmental discrimination against women is required to establish the important government interest needed to satisfy a sex-based affirmative action program. *Compare Coral Constr.*, 941 F.2d at 932 (no such evidence needed) *with Michigan Road Builders*, 834 F.2d at 595 (evidence needed). Logically, a city must be able to rely on less evidence in enacting a gender preference than a racial preference because applying *Croson*'s evidentiary standard to a gender preference would eviscerate the difference between strict and intermediate scrutiny.

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was "a product of analysis rather than a stereotyped reaction based on habit." *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 582-83, 110 S. Ct. 2997, 3018-19, 111 L. Ed. 2d 445 (1990) (citation and internal quotation marks omitted). We believe this standard requires the City to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors. *Compare Metro Broadcasting*, 497 U.S. at 580, 110 S. Ct. at 3017 ("a host of empirical evidence" supported the linkage between minority ownership of radio stations and broadcasting diversity, the challenged program's stated goal).

The City has not produced enough evidence of discrimination here. In its brief, the City relies on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business, but this evidence only reflects the participation of women in City contracting generally, rather than in the construction industry, which is the only cognizable issue here.

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The evidence offered by the City regarding women-owned construction businesses is insufficient to create an issue of fact. Significantly, the Brimmer study contains no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses.[20] Given the absence of probative statistical evidence, the City must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance. But the record contains only one three-page affidavit alleging gender discrimination in the construction industry. The only other testimony on this subject consists of a single, conclusory sentence of one witness who appeared at a City Council hearing.[21] This evidence is not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard. Therefore, we will affirm the grant of summary judgment invalidating the gender preference for construction contracts. We see no impediment to the City re-enacting the preference if it can provide probative evidence of discrimination.

C. *Handicap*

Finally we address the two-percent preference for businesses owned by handicapped persons. The district court struck down this preference under the rational basis test, believing *Croson*

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20. In the years immediately preceding the Ordinance, there were only 18 women-owned construction businesses in Philadelphia — two tenths of one percent of the total of 8,050 Philadelphia construction firms.

21. The record contains an additional affidavit from a woman contractor and other oral testimony by the City Council witness referred to but this testimony and affidavit complain of racial rather than gender discrimination. *See Coral Constr.*, 941 F.2d at 918 n. 7 (distinguishing testimony from women contractors regarding the different types of discrimination).

required some evidence of discrimination against business enterprises owned by handicapped persons and therefore that the City could not rely on testimony of discrimination against handicapped individuals. 735 F. Supp. at 1308.

A classification will pass the rational basis test if it is "rationally related to a legitimate government purpose," *Cleburne*, 473 U.S. at 440, 105 S. Ct. at 3254. The Supreme Court recently reaffirmed the permissiveness of this test in *Heller v. Doe*, __ U.S. __, __-__, 113 S. Ct. 2637, 2642-43, 125 L. Ed. 2d 257 (1993), indicating that "a [statutory] classification" subject to rational basis review "is accorded a strong presumption of validity," and that "a state . . . has no obligation to produce evidence to sustain the rationality of [the] classification." Moreover, "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Id.* (citation omitted).

The City stated it sought to minimize discrimination against businesses owned by handicapped persons and encourage them to seek City contracts. We agree with the district court that these are legitimate goals. But unlike the district court, we believe the two-percent preference is rationally related to this goal.

The City offered anecdotal evidence of discrimination against handicapped persons. Prior to amending the Ordinance in 1988 to include the preference, City Council held a hearing where eight witnesses testified regarding employment discrimination against handicapped persons both nationally and in Philadelphia. Four witnesses spoke of discrimination against blind people, and three testified to discrimination against people with other physical handicaps. Two of the witnesses, who were

physically disabled, spoke compellingly of discrimination they and others had faced in the work force. One of these disabled witnesses testified he was in the process of forming his own residential construction company. Additionally, two witnesses testified that the preference would encourage handicapped persons to own and operate their own businesses.

We believe, under the rational basis standard, that the Contractors did not carry their burden of negativing every basis which supports the legislative arrangement, *see Heller*, __ U.S. at __, 113 S. Ct. at 2643, and that City Council was entitled to infer discrimination against the handicapped from this evidence as was entitled to conclude the Ordinance would encourage handicapped persons to form businesses to win City contracts. Therefore, we will reverse the district court's grant of summary judgment invalidating this aspect of the Ordinance and remand for entry of an order granting summary judgment to the City and UMEA on this issue.

VI.

For the foregoing reasons, we will vacate the district court's grant of summary judgment on the non-construction provisions of the Ordinance, reverse the grant of summary judgment on the construction provisions of the Ordinance as applied to businesses owned by Black persons and handicapped persons, affirm the grant of summary judgment on the construction provisions of the Ordinance as applied to businesses owned by Hispanic, Asian-American, or Native American persons or women, and remand for further proceedings in accordance with this opinion.

APPENDIX E — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED SEPTEMBER 22, 1992

CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, et al. v. CITY OF PHILADELPHIA, et al. and UNITED MINORITY ENTERPRISE ASSOCIATES, INC.

CIVIL ACTION NO. 89-2737

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1992 U.S. Dist. LEXIS 14416

September 22, 1992, Decided
September 22, 1992, Filed; September 23, 1992, Entered

COUNSEL: [*1] For CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, INC., GENERAL BUILDING CONTRACTORS ASSOCIATION, INC., ASSOCIATED MASTER PAINTERS & DECORATORS OF PHILADELPHIA, INC., EMPLOYING BRICKLAYERS ASSOCIATION OF THE DELAWARE VALLEY, INC., INTERIOR FINISH CONTRACTORS ASSOCIATION, INC., MECHANICAL CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, INC., ROOFING AND SHEET METAL CONTRACTORS ASSOCIATION, INC., SUB-CONTRACTORS ASSOCIATION OF DELAWARE VALLEY, INC., NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., PLAINTIFFS: THOMAS J. MC GOLDRICK, MC ALEESE, MC GOLDRICK & SUSANIN, P.C., 455 SOUTH GULPH ROAD, STE. 240 - EXECUTIVE TERRACE, KING OF PRUSSIA, PA 19406, USA. JOHN J.

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MC ALEESE, JR., 455 S. GULPH ROAD, EXECUTIVE TERRACE, SUITE 240, KING OF PRUSSIA, PA 19406, USA. JOHN H. WIDMAN, MC ALEESE, MC GOLDRICH & SUSANIN, P.C., 455 S. GULPH ROAD, EXECUTIVE TERRACE, SUITE 240, KING OF PRUSSIA, PA 19406, USA.

For CITY OF PHILADELPHIA, ELIZABETH REVEAL, AS DIRECTOR OF FINANCE FOR THE CITY OF PHILADELPHIA, CURTIS JONES, JR., AS DIRECTOR OF THE MINORITY BUSINESS ENTERPRISE COUNCIL, DEFENDANTS: SEYMOUR KURLAND, DECHERT, PRICE & RHOADS, 1717 ARCH STREET, 4000 BELL ATLANTIC TOWER, PHILA, PA 19103-2793, [*2] USA. THOMAS J. WAMSER, DEPUTY CITY SOLICITOR, MUNICIPAL SERVICE BUILDING, 15TH FLOOR, PHILADELPHIA, PA 19102-1692, USA. JAMES P. COUSOUNIS, LUTHER E. WEAVER, CHARLES W. BOWSER, BOWSER, WEAVER & COUSOUNIS, P.C., 1650 ARCH STREET, STE. 2290, PHILA, PA 19103, USA.

For UNITED MINORITY ENTERPRISE ASSOCIATES, INC., INTERVENOR-DEFENDANT: ROBERT T. VANCE, JR., BROWN, VANCE, JACKSON & SMITH, 718 ARCH STREET, THE CAST IRON BLDG., STE. 304S, PHILA, PA 19106, USA.

For PHILADELPHIA URBAN COALITION, PHILADELPHIA URBAN LEAGUE, MINORITY ENTERPRISE DEVELOPMENT COMMITTEE, MOVANTS: CARL E. SINGLEY, 230 SOUTH BROAD STREET, 2ND FLOOR, PHILA, PA 19102, USA. For REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA, MOVANT: CHARISSE R. LILLIE, DEPUTY CITY SOLICITOR, MUNICIPAL SERVICE BUILDING, 15TH FLOOR,

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PHILADELPHIA, PA 19102-1692, USA. For JAMES D. MORRISSEY, INC., J. S. MC GARVEY, INC., MOVANTS: CHARLES C. HILEMAN, 1600 MARKET STREET, SUITE 3600, PHILADELPHIA, PA 19103, USA. RICHARD S. MAILMAN, RICHARD S. MAILMAN, 8101 WASHINGTON LANE, ONE WASHINGTON SQUARE, WYNCOTE, PA 19095-0137, USA.

JUDGES: BECHTLE

OPINION BY: LOUIS C. BECHTLE

OPINION: MEMORANDUM AND ORDER

BECHTLE, CH. J.

In April of 1989, nine incorporated associations [*3] of contractors comprised of general contractors or subcontractors which had participated in city of Philadelphia ("City") construction projects brought suit against the City, the City's director of finance, and the director of the Minority Business Enterprise Council ("MBEC") to have declared invalid Chapter 17-500 of the Philadelphia Code ("the Ordinance") and related MBEC regulations. The United Minority Enterprise Associates, Inc. ("Minority Associates") intervened as defendant. The Ordinance set aside the award of City contracts for classifications based on race, ethnicity, gender, and handicap. On April 5, 1990, the court granted plaintiffs' cross-motion for summary judgment. The court held that the associations had standing to challenge the Ordinance, and, in accordance with City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S.Ct. 706 (1989), the court also ruled that the Ordinance's race-based and ethnicity-based set-asides did not satisfy the strict scrutiny test; the gender-based

set-asides did not satisfy the intermediate scrutiny test; the handicapped-based set-asides did not satisfy the rational basis test; and the "sheltered [*4] market" program established by MBEC regulations violated the equal protection clause. Defendants appealed.

On September 30, 1991, the United States Court of Appeals for the Third Circuit vacated the court's April 15, 1990 decision. Contractors Ass'n of Eastern Pennsylvania v. Philadelphia, 945 F.2d 1260 (1991). Except for the question of plaintiffs' standing, which the Third Circuit affirmed, the Third Circuit did not reach the merits of the court's decision; rather, the Third Circuit held that the court had abused its discretion in not granting Minority Associate's Federal Rule of Civil Procedure 56(f) motion to delay consideration of the cross-motions for summary judgment pending additional discovery as required under Lunderstadt v. Colafella, 885 F.2d 66 (3d Cir. 1989). The case was remanded for the limited purpose of conducting additional discovery. On remand, the court promptly initiated the appropriate discovery hearings, set a discovery schedule in cooperation with all counsel, granted reasonable modifications and extensions of the discovery plan and resolved disputes concerning discovery which arose. Including several [*5] extensions, defendants have had eight months to conduct discovery, a time period which the court considers adequate. Presently before the court are cross-motions for summary judgment.

The court has carefully reviewed the present submissions, including those based on the additional discovery, and has concluded that the additional discovery has not produced any evidence which would cause the court to reconsider its prior ruling. While the court respects the diligence with which defendants' counsel have represented their clients in this latest

stage of this proceeding, the simple fact remains that the substance of defendants' present position is almost entirely devoted to arguments previously presented to and rejected by the court. Before this case was originally decided, the court conducted an exhaustive review of a substantial record, which included dozens of exhibits as well as over 800 pages of testimony. In its lengthy discussion, this court presented a detailed summary of the relevant constitutional and statutory case law and thoroughly delineated the rationale underlying its decision. The court will not do so again here because the record supporting the original decision is not [*6] changed by the additional discovery material.

The Third Circuit did not vacate the court's April 5, 1990 decision so that the defendants could submit again their arguments based on the same record which was previously before the court. According to the Third Circuit, the case was remanded so that Minority Associates would have "a reasonable opportunity to discover evidence that relates to a pattern of discriminatory practices or instances of discrimination in the Philadelphia-area construction industry that occurred over time before passage of the Ordinance." 945 F.2d at 1267. The court was not required, nor could it be expected, to reconsider its original analysis in the abstract or to reexamine the entire pre-remand record unless new discovery disclosures warranted such attention, which is not the case. Nevertheless, in fairness to the defendants, the court has carefully reviewed its prior decision and the parties' current submissions and has failed to find any new evidence or new principle of law which would warrant a different result. In so ruling today, the court incorporates by reference its April 5, 1990 decision and summary judgment will once again [*7] be entered in favor of plaintiffs and against defendants.

An appropriate Order will be entered.

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ORDER

AND NOW, TO WIT, this 22nd day of September, 1992, upon consideration of plaintiffs' and defendants' cross-motions for summary judgment, IT IS ORDERED that plaintiffs' cross-motion is granted, and defendants' cross-motion is denied.

The court hereby declares that the minority-, female- and handicapped-owned business enterprise set-aside programs set forth at Chapter 17-500 of the Philadelphia Code and the implementing regulations are unconstitutional.

The court hereby permanently enjoins defendants from enforcing or implementing Chapter 17-500 and its regulations.

LOUIS C. BECHTLE, CH. J.

APPENDIX F — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DECIDED SEPTEMBER 30, 1991

CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, INC.; General Building Contractors Association, Inc.; Associated Master Painters & Decorators of Philadelphia, Inc.; Employing Bricklayers Association of Delaware Valley, Inc.; Interior Finish Contractors Association, Inc.; Mechanical Contractors Association of Eastern Pennsylvania, Inc.; Roofing and Sheet Metal Contractors Association, Inc.; Sub-Contractors Association of Delaware Valley, Inc.; National Electrical Contractors Association, Inc.

v.

CITY OF PHILADELPHIA; Elizabeth Reveal, as Director of Finance for the City of Philadelphia; Curtis Jones, Jr., as Director of the Minority Business Enterprise Council,

United Minority Enterprise Associates Inc., Intervening Defendant,

The City of Philadelphia, Appellant at No. 90-1295,

United Minority Enterprise Associates Inc., Appellant at No. 90-1296.

Nos. 92-1295, 90-1296

United States Court of Appeals,
Third Circuit.

Argued Nov. 16, 1990
Decided Sept. 30, 1991.

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* * *

Charles W. Bowser (argued), James P. Cousounis, Bowser, Weaver & Cousounis, P.C., and Charisse Lillie, City Sol., Philadelphia, Pa., for City of Philadelphia.

Robert T. Vance, Jr. (argued), Brown, Vance, Jackson & Smith, Philadelphia, Pa., for United Minority Enterprise Associates, Inc.

John J. McAleese, Jr. (argued), Thomas J. McGoldrick, John H. Widman, McAleese, McGoldrick & Susanin, P.C., King of Prussia, Pa., for appellees.

Before GREENBERG, HUTCHINSON and HIGGINBOTHAM,* Circuit Judges.

OPINION OF THE COURT

HUTCHINSON, Circuit Judge.

The City of Philadelphia (City) and United Minority Enterprise Associates, Incorporated (Minority Associates) appeal an order of the United States District Court for the Eastern District of Pennsylvania granting appellee Contractors Association of Eastern Pennsylvania, Incorporated, and other trade associations with members that do business in the construction industry in the Philadelphia metropolitan region (collectively "Contractors"),[1] summary judgment on

* At the time of argument, Judge Higginbotham was Chief Judge but has since assumed Senior status.

1. The collective term "Contractors" means Contractors Association of (Cont'd)

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Contractors' claim that Chapter 17-500 of the Philadelphia Code (Ordinance), Philadelphia's public contract set-aside law, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *See Contractors Assn of E. Pa., Inc. v. City of Phila.*, 735 F.Supp. 1274 (E.D.Pa.1990). Among other contentions, Minority Associates argues that the district court erred by granting the Contractors' motion without giving Minority Associates a chance to pursue additional discovery on the existence of discrimination in the Philadelphia construction market that could justify the various set-asides in the Ordinance. Minority Associates' opposition to Contractors' motion for summary judgment was accompanied by a Federal Rule of Civil Procedure 56(f) affidavit. The affidavit stated that Minority Associates needed time to undertake further discovery. We think Minority Associates should have been given a reasonable opportunity for further discovery and will therefore vacate the district court's order granting Contractors' summary judgment and remand for further proceedings consistent with this opinion.

I.

This appeal concerns claims Contractors made in an amended complaint dated May 19, 1989 that was filed in the district court in their suit to strike down Chapter 17-500 of the Philadelphia City Code and the regulations promulgated under

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(Cont'd)

Eastern Pennsylvania, Incorporated; General Building Contractors Association, Incorporated; Employing Bricklayers Association of Delaware Valley, Incorporated; and Subcontractors Association of Delaware Valley, Incorporated. These four are those plaintiffs the district court held met the standing requirements of Article III of the United States Constitution. *See Contractors Ass'n of E. Pa., Inc. v. City of Phila.*, 735 F.Supp. at 1283-84 & n. 3.

that Ordinance as contrary to the United States and Pennsylvania Constitutions and federal and state statutes guaranteeing them, *inter alia*, equal protection of the laws. The City filed an answer as did Minority Associates, an intervening defendant. On October 11, 1989, the City moved for judgment on the pleadings or, alternately, summary judgment on the grounds that Contractors lacked standing to sue and did not state a cause of action under the Equal Protection Clause, 42 U.S.C.A. § 1983 (West 1981) and § 1981 (West 1981). The City also moved for judgment on the pleadings on the state law claims alleging that if the federal claims were dismissed the court would lack pendent jurisdiction. The Contractors replied and filed a cross-motion for summary judgment on its Equal Protection Clause and section 1983 claims.

The City opposed Contractors' cross-motion for summary judgment arguing mainly that genuine issues of fact remained to be resolved. Minority Associates joined the City's opposition and asked for a continuance so that discovery could be completed before the Contractors' motion was ruled on.

On April 5, 1990, the district court granted Contractors' cross-motion, denied the City's motion, declared the minority-, female- and handicapped-owned business enterprise set-aside programs set forth in the Ordinance and the implementing regulations unconstitutional and permanently enjoined the City from enforcing or implementing the Ordinance or the regulations. The City filed its notice of appeal on April 10, 1990, and Minority Associates filed its notice of appeal on April 12, 1990.[2]

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2. After oral argument, this Court received supplemental briefing from the parties in April and May of 1991.

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II.

The district court had subject matter jurisdiction over the section 1983 claim that the Ordinance violated Contractors' right to equal protection under 28 U.S.C.A. § 1331 (West Supp.1991) and 28 U.S.C.A. § 1343(a)(3) & (4) (West Supp.1991). We have appellate jurisdiction over the City's and Minority Associates' appeals from the district court's final order under 28 U.S.C.A. § 1291 (West Supp. 1991).

Our review of the district court's order denying the City's summary judgment on standing and its order granting Contractors' motion for summary judgment on the merits is plenary. *See Country Floors, Inc. v. A Partnership Composed of Gepner & Ford*, 930 F.2d 1056, 1060 (3d Cir.1991). We review the district court's refusal to postpone action on the Contractors' motion pending further discovery by Minority Associates for abuse of discretion. *See Lunderstadt v. Colafella*, 885 F.2d 66, 71-72 (3d Cir.1989). If information concerning the facts to be discovered is solely in the possession of the movant, however, "a motion for continuance of a motion for summary judgment for purposes of discovery should [then] ordinarily be granted almost as a matter of course." *Ward v. United States*, 471 F.2d 667, 670 (3d Cir.1973) (citations omitted). The *Ward* rationale would not seem to apply, however, when the party seeking discovery has the information it seeks in its own possession or can get it from a source other than the movant.

III.

The Ordinance in question is entitled "Goals For The Participation Of Minority, Female And Handicapped Owned Businesses In City Contracts." II Appendix (App.) at 310.

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Through various means, the Ordinance seeks to increase the number of "Disadvantaged Business Enterprises" owned by minorities, women or handicapped persons who are awarded city contracts. A Disadvantaged Business Enterprise is any small business "which is at least 51 percent (51%) owned by one or more socially and economically disadvantaged individuals." [3] *Id.* at 311. The Ordinance creates an agency called the Minority Business Enterprise Council (the agency). The agency is charged

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3. The class of "socially and economically disadvantaged individuals" is defined as follows:

> (11) *Socially and Economically Disadvantaged Individuals* shall mean those individuals who have either been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.
>
> (a) In determining who are socially and economically disadvantaged individuals, the Minority Business Enterprise Council may make a reputable presumption that all minority persons, all women and all handicapped persons shall be so classified.
>
> (b) The Minority Business Enterprise Council, in making said determination, shall also consider, among other things the extent of the liquid assets and net worth of such socially disadvantaged individuals.

Id.

with the administration of the Ordinance, which authorizes the agency to presume that all minorities, women and handicapped persons are socially and economically disadvantaged persons. Once a Disadvantaged Business Enterprise receives contract work of more than $5,000,000.00 from the City under the Ordinance, that business is rebuttably presumed not to be disadvantaged. The Ordinance sets "goals" of fifteen-percent participation in city contracts for minority-owned businesses, ten percent for female-owned businesses and two percent for handicapped-owned businesses. Finally, the Ordinance contains provisions that allow the agency to waive its set-aside requirements in certain situations.

A.

We first address the City's standing claim because it goes to the subject matter jurisdiction of the district court. *See Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, __ U.S. __, 111 S.Ct. 2298, 2306 & n. 13, 115 L.Ed.2d 236 (1991) (Court first addressed standing and ripeness claims that could impair the Court's power to hear the case). The City contends that the Contractors lack standing for two reasons. First, the City says the Contractors did not establish that they suffered an injury-in-fact. Second, the City maintains that the Contractors cannot claim organizational standing because of conflicts of interest among the members of the organizations. We reject both challenges.

The Supreme Court of the United States has stated:

> The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party. . . . A federal

> court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action. . . ."

Warth v. Seldin, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975) (citations omitted) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973)). An association can have standing on the basis of direct injury against itself as an association. *See Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40, 96 S.Ct. 1917, 1925, 48 L.Ed.2d 450 (1976). Under certain circumstances, an association can also have standing on the basis of injury to its members.

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington State Apple Advertising Comm'n, 482 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977). The district court determined that Contractors met Hunt's requirements. *Contractors Ass'n*, 735 F.Supp. at 1281-87. We agree with its analysis.[4]

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4. In *Rocks v. City of Philadelphia*, 868 F.2d 644, 648 (3d Cir. 1989), this Court held that municipal taxpayers did not have standing to challenge

(Cont'd)

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The City's second argument on standing merits more discussion. Because an association represents many individuals, the potential for conflict of interest exists among its members. The City notes that some of the Contractors' members qualify as disadvantaged businesses and actually oppose the litigation, and thus a conflict of interest exists that denies Contractors standing.

In considering whether a target corporation had standing to assert the interests of its shareholders in the case of a hostile takeover, we stated that "associational standing has never been granted in, the presence of serious conflicts of interest either among the members of an association or between an association and its members." *Polaroid Corp. v. Disney,* 862 F.2d 987, 999 (3d Cir.1988). We explained the rationale for denying standing to the corporation in that case as follows:

> [A] potential conflict [exists] between those shareholders who view litigation to enjoin a tender offer as adversely affecting their opportunity to collect on the tender offer premium and those shareholders who are cut out of the tender offer and thus may want to see it defeated. Even though some shareholders are disadvantaged by their exclusion from the tender offer, a great

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(Cont'd)

Chapter 17-500 absent a showing that they had "sustained a proximate, individual and addressable injury, based solely on their status as municipal residents and taxpayers," but in *dicta,* stated that: "Contemplating the appellants' allegation, we think that an article III injury to contractors and bidders at large has been mae out." This supports, but does not compel, our result.

> majority of shareholders will often benefit from the offer. A corporation is thus an uncertain representative for the interests of the disadvantaged shareholders, as it may have an eye to protecting the interests of the majority. This undermines the basis for *jus tertii* standing — that the *jus tertii* advocate will vigorously assert the interests of the right-holder. *See Craig v. Boren,* 429 U.S. 190, 194, 97 S.Ct. 451, 455, 50 L.Ed.2d 397 (1976); *Singleton v. Wulff,* 428 U.S. 106, 114, 96 S.Ct. 2868, 2874, 49 L.Ed.2d 826 (1976) (plurality opinion). Indeed, one basis for the *constitutional* requirement that a litigant have a personal stake in a litigation have a personal stake in a litigation is "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." *Simon v. Eastern Kentucky Welfare Right [sic] Organization,* 426 U.S. 26, 38 n. 16, 96 S.Ct. 1917, 1924 n. 16, 48 L.Ed.2d 450 (1976) (quoting *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)).

Id. (emphasis in original).

In *Polaroid,* we noted two possible conflicts that could prevent a target corporation from seeking standing on behalf of its shareholders. The first is between management, who would seek to defeat the takeover to remain in control, and the shareholders, who could profit from the tender offer. The second

conflict is between the shareholders who will profit from the tender offer, normally the majority of shareholders, and the target corporation when the target corporation sides with the shareholders who will not profit from the tender offer, normally the minority of shareholders. The conflict in our case is of the second type. In the matter at hand, however, the City and Minority Associates do not argue that Contractors are not representing the interests of a majority of their membership. Only twenty-nine of Contractors' 535 members are registered handicapped Business Minority, Female or Handicapped Business Enterprises. *Contractors Ass'n,* 735 F.Supp. at 1286. There is little chance that the conflict between the majority and minority of the Contractors' members will affect the adequacy of representation or present a likelihood of a collusive suit that would deprive the court of vigorous advocacy on all sides of this dispute. When an association has not violated its members' rights by ignoring the association's by-laws before bringing an action on a matter of concern to the membership, it is primarily concern over the absence of strong advocacy on both sides of a controversy that has motivated courts to hold that a conflict of interest among its members deprives an association of associational standing. *See National Collegiate Athletic Assn v. Califano*, 622 F.2d 1382, 1391-92 (10th Cir. 1980) (an association cannot have associational standing if more members oppose the association's position than support it); *Associated Gen. Contractors of Conn., Inc. v. City of New Haven*, 130 F.R.D. 4, 10 (D.Conn.1990) ("[a]s long as the [law] suit is not in contravention of [the association's] purposes nor its bylaws . . . it has [associational] standing"); *Mountain States Legal Found. v. Dole*, 655 F.Supp. 1424, 1426 (D.Utah 1987) ("Because associations typically consist of many members with potentially conflicting interests and views on any particular dispute, a danger exists that certain members of the association will be

sympathetic to the adverse party. In such a case, there could be no legitimate controversy.").[5] The Contractors' position in this litigation is not contrary to the interests of a majority of their members, and there is nothing on this record indicating that they failed to follow their own internal rules before joining this litigation. Therefore, the City's argument fails, and we hold that Contractors[6] have associational standing to maintain the present action.

B.

On the merits, Minority Associates contends that the district court erred in granting summary judgment to the Contractors since Minority Associates did not have enough time to discover evidence it believed was in the possession of the Contractors which would show the existence of past and present discrimination by Contractors against entities that would qualify as Disadvantaged Business Enterprises and so preclude the entry of summary judgment for Contractors under the teaching of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). Accordingly, it argues that the district court should have delayed ruling on the Contractors' motion for summary judgment until it and the City completed discovery.

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5. The United States Court of Appeals for the District of Columbia Circuit has rejected the theory that an internal conflict of interest may deprive an organization of standing. *See Humane Society of the United States v. Hodel*, 840 F.2d 45, 59-60 n. 25 (D.C. Cir. 1988); *National Maritime Union v. Command, Military Sealift Command*, 824 F,.2d 1228, 1234 (D.C.Cir.1987).

6. The reader is reminded that the term "Contractors" as used in this opinion encompasses all the trade associations that joined in bringing this action who were found to have met Article III's requirements for standing by the district court. *See supra* note 1.

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Minority Associates formally advised the district court of its need for further discovery in accord with Federal Rule of Civil Procedure 56(f). Rule 56(f) states:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed.R.Civ.P. 56(f). Whether such a motion should be granted depends, in part, on "what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained." *Lunderstadt*, 885 F.2d at 71 (quoting *Dowling v. City of Phila.*, 855 F.2d 136, 140 (3d Cir.1988)).

In order to examine the first consideration specified in *Lunderstadt*, what information is sought, we must look to the affidavit filed with the Rule 56(f) motion. It seeks information from Contractors concerning "past and current practices and/or instances of discrimination by plaintiffs and their members in both the public and private construction industries." II App. at 305. The affidavit also states that Minority Associates plans to seek this information from Contractors through testimony on depositions, interrogatories, and requests for production of documents served on Contractors.

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Knowing what information Minority Associates seeks, we turn to the next part of *Lunderstadt*'s inquiry whether the information sought, if uncovered, could preclude summary judgment. *See Lunderstadt*, 885 F.2d at 71. This inquiry into the substantive law on the constitutionality of minority set-asides is controlled by the Supreme Court's decision in *Croson*. From the opinions in that case, we must determine whether the information Minority Associates seeks could create a genuine dispute of material fact and so defeat Contractors' motion for summary judgment.

In *Croson*, a majority of the Supreme Court held that the City of Richmond had not demonstrated a compelling governmental interest that would justify its racially based set-aside ordinance. *Croson*, 109 S.Ct. at 723-28. A plurality of the Court also held that the set-aside program violated the Equal Protection Clause of the Fourteenth Amendment because the City of Richmond had not demonstrated that the ordinance was necessary to remedy past discrimination. *Id.* at 730 (plurality opinion). The lack of record evidence concerning past "discrimination in the local construction industry" was fatal to the ordinance. *Id.* at 726; *see id.* at 723 & 727. The plurality says that this evidence is necessary to the constitutionality of a minority set-aside ordinance. *See id.* at 729-30 (plurality opinion). We conclude that the evidence of past discrimination Minority Associates seeks could preclude summary judgment if the City Council's purpose in creating the various set-asides was to remedy such discrimination.

Application of the last *Lunderstadt* factor requires an inquiry into why the party seeking more time has not previously obtained the information. In its Rule 56(f) affidavit, Minority Associates stated that Contractors had not yet answered many

of the City's interrogatories seeking information Minority Associates needs to formulate its own interrogatories and depositions. Minority Associates also noted that the City's depositions of some of Contractors' members, in which Minority Associates would participate, had been noticed but not taken when the district court granted Contractors' motion for summary judgment Minority Associates attributes this delay to the Contractors' desire for a protective order and its intent to move for such an order. These reasons are sufficient to explain why the information has not been previously obtained.

Since Minority Associates' request for more time to engage in discovery was for the purpose of seeking information that could defeat a summary judgment motion, which it could not have previously obtained, under *Lunderstadt,* its Rule 56(f) affidavit authorized the district court to delay action on the Contractors' motion for a reasonable time.

This conclusion does not, however, end our inquiry. A district court has discretion in acting on Rule 56(f) motions. *See Koplove v. Ford Motor Co.,* 795 F.2d 15, 18 (3d Cir.1986). The *Lunderstadt* factors simply offer a guide for a district court to follow in exercising its discretion under Rule 56(f).

In this case, however, the breadth of the district court's discretion is affected by Contractors' possession of records that contain the information Minority Associates seeks. As we said earlier, this limits the district court's discretion to deny a request for delay when a proper Rule 56(f) affidavit is filed. In such a case, a district court should grant a Rule 56(f) motion almost as a matter of course unless the information is otherwise available to the non-movant. *See Ward,* 471 F.2d at 670. Here, Minority Associates' Rule 56(f) affidavit avers the information it seeks

from Contractors is not otherwise available. Thus, the record before us shows the *Lunderstadt* factors are present. *See Lunderstadt,* 885 F.2d at 71. It also demonstrates no undue delay. *Cf. id.*

Unanswered interrogatories and notices to take depositions directed to Contractors were outstanding when the district court ruled on Contractors' motion for summary judgment, a practice this Court has disapproved. *See Sames v. Gable,* 732 F.2d 49, 51 (3d Cir.1984). Accordingly, we conclude that the district court abused its discretion when it refused Minority Associates the delay it sought pursuant to Rule 56(f). On remand, Minority Associates should be given a reasonable opportunity to discover evidence that relates to a pattern of discriminatory practices or instances of discrimination in the Philadelphia-area construction industry that occurred over time before passage of the Ordinance.[7] We are confident that the district court will require the Contractors to move promptly for any protective orders they desire and thereafter impose reasonable limits on the scope and time for completion of the discovery Minority Associates seeks.

IV.

The district court abused its discretion in not allowing a

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7. Though Minority Associates may also compile and submit evidence of instances of discrimination that pre-date the passage of the ordinance, we note that the questions of whether eviidence of past discrimination not known to City Council when it passed the Ordinance is proof material to the legislative purpose of correcting such discrimination that *Croson* requires, or whether anecdotal evidence of discrimination is sufficient to show the compelling interest *Croson* requires are not now before us.

continuance before ruling on the pending motions for summary judgment. Consequently, our opinion takes no view on any of the other issues presented in this appeal with the exception that we agree with the district court's holding that the Contractors' have standing. Beyond that, we will vacate the order of the district court and remand for further proceedings consistent with this opinion. Each party to bear its own costs.

A. LEON HIGGINBOTHAM, Jr., Circuit Judge, concurring in judgment.

I agree with the majority's conclusion and thoughtful opinion that the district court's order should be vacated, and that further discovery should be conducted. I write separately because in my opinion the majority makes a too premature decision to apply the strictures of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), in a facial challenge to Chapter 17-500. As will be noted later, the factual matrix and the legislative standards in this case are, in many ways, remarkably different than those involved in *Croson*. While it is appropriate for the majority to inquire "into the substantive law on the constitutionality of minority set-asides" (Majority at 1266), I am not convinced that *Croson* is concentric with this case, and thus I write to make clear what I think are the significant differences.

In *Croson*, the Supreme Court set forth the strict scrutiny analysis applicable when a federal court is presented with a challenge to a race-based minority set-aside. Given the standard for summary judgment, I find problematic the fact that the majority might be implicitly assuming that strict scrutiny is applicable to Chapter 17-500. On its face, the ordinance does not assign government benefits according to an individual's

race, nor does it require the City to do so. A general policy that permits but does not require unconstitutional conduct is not facially unconstitutional. *See, eg., Cone Corp. v. Florida Dept. of Trans.*, 921 F.2d 1190, 1209 (11th Cir.), *cert. denied*, __ U.S. __, 111 S.Ct. 2238, 114 L.Ed.2d 479 (1991). I submit that a careful review of the record in this case demonstrates that there are issues of material fact in dispute concerning whether the *Croson* analysis should be applied to Chapter 17-500.

For present purposes, strict scrutiny only applies when the government grants a benefit or imposes a burden because of the race of the plaintiff. The majority's semantic approach of placing the word "goals" in quotes and then changing the terminology to "set-aside requirements," *see* Majority at 1264, is not an adequate analysis of the terms of the challenged ordinance. With all due respect, I submit that the present record cannot by itself support the application of *Croson's* strict scrutiny analysis to this case. In the words of Justice O'Connor, "[t]his dispute regarding the appropriate standard of review may strike some as a lawyer's quibble over words, but it is not. The standard of review establishes whether and when the Court and Constitution allow the Government to employ racial classifications." *Metro Broadcasting, Inc. v. F.C.C.*, __ U.S. __, 110 S.Ct. 2997, 3033, 111 L.Ed.2d 445 (1990) (O'Connor, J., dissenting).

When presented with an equal protection challenge the first duty of the court is to determine what classifications have been created by the ordinance. Only after that issue is settled can the court determine the level of scrutiny appropriate to the classifications involved and proceed to the merits of the plaintiff's case. *See Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 906 n. 6, 106 S.Ct. 2317, 2470 n. 6, 90 L.Ed.2d

899 (1986); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 253, 94 S.Ct. 1076, 1079-80, 39 L.Ed.2d 306 (1974); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17, 93 S.Ct. 1278, 1288, 36 L.Ed.2d 16 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 335, 92 S.Ct. 995, 999, 31 L.Ed.2d 274 (1972). A court cannot merely assume that a suspect classification has been created. *See San Antonio Independent School District*, 411 U.S. at 19, 93 S.Ct. at 1289. This determination must be made in light of how the ordinance actually is implemented. In *San Antonio Independent School District*, both the majority and dissenters recognized that their task was "to ascertain whether, in fact, the . . . system has been shown to discriminate . . . and, if so, whether the resulting classification may be regarded as suspect." 411 U.S. at 20, 93 S.Ct. at 1289-90; *Id.* at 94, 93 S.Ct. at 1328 ("It is, of course, essential to equal protection analysis to have a firm grasp upon the nature of the discrimination at issue.") (Marshall, J., dissenting); see *Long v. Saginaw*, 911 F.2d 1192, 1198 n. 3 (6th Cir.1990); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 911 (11th Cir.), *cert. denied* __ U.S. __, 111 S.Ct. 516, 112 L.Ed.2d 528 (1990); *Conlin v. Blanchard*, 890 F.2d 811, 817 (6th Cir.1989); *General Building Contractors Assn., Inc. v. Philadelphia*, 762 F.Supp. 1195, 1205 (E.D.Pa. 1991); *cf. Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 653, 107 S.Ct. 1442, 1463, 94 L.Ed.2d 615 (1987) (O'Connor, J., concurring in judgment) (concerning Title VII). The appropriate test is "but for": But for the plaintiff's race, or gender, would he have been disadvantaged by the challenged statute? *See, e.g., Los Angeles, Dept. of Water & Power v. Manhart*, 435 U.S. 702, 711, 98 S.Ct. 1370, 1377, 55 L.Ed.2d 657 (1978).

Of the two relevant provisions in the ordinance, the first

adopts goals for City contracting. It was this section of the ordinance upon which the district court based its conclusion that Chapter 17-500 creates suspect classifications. On the summary judgment record, the district court concluded that these goals were being implemented as set-asides, and that therefore strict scrutiny was warranted. Although it is unclear, it is apparently this section of the Ordinance that the majority relies upon to justify its application of *Croson* to Chapter 17-500. However, because this provision merely sets goals and requires no action on the part of the City, this provision does not create any rights on the part of minority owned firms or any responsibilities owed those firms by the City. This provision, on its face, therefore, does not trigger strict scrutiny, in contrast to the Richmond Plan considered in *Croson.*

Of equal importance is the fact that when ruling upon a facial challenge to a statute, a court *must* consider any limiting construction a state or municipality has placed on a law, including any administrative interpretation and implementation of that law. *See Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 2756, 105 L.Ed.2d 661 (1989); *Hoffman Estates v. Flipside*, 455 U.S. 489, 494 n. 5, 102 S.Ct. 1186, 1191 n. 5, 71 L.Ed.2d 362 (1982); *Hotel & Restaurant Employees & Bartenders Int'l Union v. Read*, 832 F.2d 263, 268 (3d Cir.1987); *Trade Waste Management Assoc. v. Hughey*, 780 F.2d 221, 236 n. 6 (3d Cir.1985). As this court noted in *Hohe v. Casey*, 868 F.2d 69, 71 n. 2 (3d Cir.1989): "it is the procedures followed . . . which are at issue, since 'the courts will not invalidate a statute on its face simply because it may be applied unconstitutionally, but only if it *cannot* be applied consistently with the Constitution.' " (quoting *Robinson v. New Jersey*, 806 F.2d 442, 446 (3d Cir.1986), *cert. denied* 481 U.S. 1070, 107 S.Ct. 2463, 95 L.Ed.2d 872 (1987)).

Appendix F

The cornerstone of the Contractors' argument is that the 15%, 10%, and 2% figures constitute the operative section because they allegedly set a rigid quota, or even floor, for the participation rate of the groups to which they apply. The Contractors conclude that because only minorities, women, and handicapped individuals are listed as qualifying for a percentage, this quota is race, sex, and handicapped based. However, as the parties made clear at oral argument, there is a material issue of fact in dispute over which section is the so-called "operative" section of the ordinance.

At oral argument before this court, the City contended that "the goals do not require participation at these levels, they are goals for measuring the success of the Affirmative Action Program. They don't require that there be fifteen percent minorities or ten percent female. . . . they are really goals for measuring the program." Transcript of Oral Argument 15-16. The City's argument is supported by testimony given at council hearings when the handicapped goals were being discussed. At issue was whether the five percent goal for contracts awarded to the handicapped would, in practice, be a goal or a quota. As the discussion reveals, the Procurement Office did not oppose the five percent goal in the ordinance because it would function as a goal, *just as the percentages for Minority Business Enterprises ("MBEs") and Female Business Enterprises ("FBEs") did.* Mr. Curtis Jones, from the Minority Business Enterprise Council, asked whether the handicapped provisions "fall under the same provisions within 17-500 which allow for a waiver process which allow for us to adjust and amend on a contract-by-contract basis. Is that true?" He then described the system used for MBEs and FBES: "If we have that system as a part of this goal, then we can make adjustments based on a fair review to see if there was a good-faith effort made by prime

contractors to achieve the goals. So if we are talking about using the same machines that we do to administer for minorities and females. . . ." The answer was yes.

Jones then responded "then I'm comfortable with what we call a goal. *It's not a quota; it's a goal"* IVB at 755-57 (emphasis added). The conclusion that the Disadvantaged Business Enterprise ("DBE") percentages were acting as goals and not quotas was also borne out by a statement of Council person Specter: "And we may not be able to reach that goal the first year, as we did not with minorities and women. But every year we come closer and closer to those goals." IVB at 750. In addition, there was specific evidence that the percentage used to gauge the participation of women does in fact work as a goal, not a quota: "Let's look at the female category for our program for example. We set a goal of ten percent for female entrepreneurs as an addition to the minority component. What we found was that that was very difficult to achieve. We've come in in about the neighborhood of a little better than eight percent overall." IVB at 760.

Under the standard for summary judgment, these colloquies create an inference that the City did not apply the ordinance inflexibly, and in fact *distinguished* the DBE *goals* from a quota system. This record creates a triable issue of fact over whether the percentages create a quota system or merely goals in Philadelphia. If the percentages do not fix any amount of the work to be allocated, then no right of the, Contractors is infringed.

Indeed, in *Croson,* the issues of goals and flexibility were of paramount importance.

Appendix F

> The Richmond Plan denied certain citizens the opportunity to compete for a *fixed percentage of public contracts* based solely upon their race. To whatever racial group these citizens belong, *their "personal rights" . . . are implicated by a rigid rule* erecting race as the sole criterion in an aspect of public decision making.

488 U.S. at 493, 109 S.Ct. at 721 (emphasis added). The Court also noted that the Richmond Plan employed a "rigid racial quota," *id.* at 499, 109 S.Ct. at 724, and that the effect of the plan was to "apportion[ ] public contracting opportunities on the basis of race." *Id.* at 505, 109 S.Ct. at 727. The Court noted that in the public contracting milieu, "it is difficult to see the need for a *rigid numerical quota.*" *Id.* at 508, 109 S.Ct. at 728 (emphasis added). In the present case, there is a material issue of disputed fact concerning whether a quota has been created, and a concomitant disputed issue over whether *Croson* is applicable.

I also note that even if the goals do parcel out contracts on the basis of disadvantage status, there is a material issue of disputed fact over whether the classification "disadvantaged status" triggers heightened scrutiny. There is a disputed issue of material fact over whether, under the definition of disadvantaged, "*only* minorities, women, and handicapped can ever be granted preferred status." I App. at 270. The City introduced an affidavit from the Executive Director of the MBEC that stated: "*Any* disadvantaged member of Plaintiff organizations . . . who are disadvantaged are eligible for certification as a DBE *without regard to their race, gender or physical capability.* The MBEC considers economic and social

factors in addition to race and gender in determining whether an applicant should be certified as a DBE." II App. at 286 (emphasis added). Giving the City the benefit of reasonable inferences, as we must on a motion for summary judgment, the record reveals that the intent of the council was to conduct an "investigation regarding the financial background of applicants to ensure that they are both socially disadvantaged and economically disadvantaged in terms of their history." IVB App. at 536-37. As discussed above, the City has introduced uncontroverted evidence, by affidavit, that this is actually how the chapter is administered. *See also* II App. at 364 (statement of Blackwell, not considered by the district court, that the ordinance was not intended to, and does not apply to, MBEs or FBEs that are not disadvantaged). The language of the ordinance supports this interpretation, and there is no evidence in the record to the contrary. In short, even assuming that the goals do in fact allocate city contracts, a conclusion this record does not dictate, if the City is correct in its assertion that the classifications merely distinguish individuals along economic and social lines, the ordinance should only be reviewed under the traditional rational basis test. *See San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

We are obligated to view the record in the light most favorable to the City. *See Colgan v. Fisher Scientific Co.,* 935 F.2d 1407, 1423 (3d Cir.1991) (in banc). The majority's implicit assumption that the *Cro*son strict scrutiny analysis applies to the Ordinance constitutes a resolution of disputed facts that goes right to the heart of whether strict scrutiny is warranted in this case. *See Ohio v. Akron Center for Reproductive Health,* __ U.S. __, 110 S.Ct. 2972, 2980-81, 111 L.Ed.2d 405 (1990); *see also id.* 110 S.Ct. at 2981 ("The Court of Appeals should

not have invalidated the . . . statute on a facial challenge based upon a worst-case analysis. . . ."). The state of the record below should leave us uncertain of the applicability of *Croson* to Chapter 17-500. I would hold that summary judgment on the question of the standard applicable to the goals section of Chapter 17-500 was inappropriate based on the record below.

The second relevant section provides that if a city agency appears unable to meet the goals, "the MBEC may request that the agency furnish to it a compliance plan. . . ." If the MBEC concludes that the compliance plan is insufficient, "the MBEC may recommend that the agency revise its plan. . . . Such recommended revisions *may* include" the sheltered market. (II App. at 317 (emphasis added).) This provision, the sheltered market provision, is the *only* section of the ordinance that, on its face, has the potential for parceling out city contracts on the basis of race, gender, or handicap status, and for therefore triggering heightened scrutiny. In order for the City to defeat a facial challenge to the Ordinance, it needs "merely to identify a possible" valid application of the challenged statute. *Baltimore & Ohio R.R. Co. v. Oberly,* 837 F.2d 108, 116 (3d Cir.1988). Chapter 17-500, however, *can* be applied in a manner that does not trigger heightened scrutiny, i.e., whenever the sheltered market is not used.

However, I do not believe that issue must be reached; under no set of circumstances is the City compelled to use the sheltered market. On its face, the ordinance contemplates many applications without resort to the use of a sheltered market, does not require the use of a sheltered market, and permits the use of the sheltered market only on a case by case basis. Obviously, the *use* of the sheltered market should be subject to heightened scrutiny, but because the ordinance permits the use

of the sheltered market only on a case by case basis, such a challenge must come as an as applied, not a facial, challenge. The majority overlooks the dictates of *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987), and *Hoffman Estates v. Flipside*, 455 U.S. 489, 494 n. 5, 102 S.Ct. 1186, 1191 n. 5, 71 L.Ed.2d 362 (1982), that a statute may only be invalidated on its face if it is incapable of *any* valid application. Thus, summary judgment in favor of the Contractors should not have been granted on this record.

APPENDIX G — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA DATED APRIL 17, 1990

CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, et al., Plaintiffs,

v.

CITY OF PHILADELPHIA, et al., Defendants,

and

United Minority Enterprise Associates, Inc., Intervening Defendants.

Civ. A. No. 89-2737.

United States District Court,
E.D. Pennsylvania.

April 17, 1990.

* * *

John J. McAleese, Jr., Thomas J. McGoldrick, John H. Widman, King of Prussia, Pa., for plaintiffs.

Charisse R. Lillie, Seymour Kurland, Robert T. Vance, Jr., Carl E. Singley, Charles W. Bowser, Luther E. Weaver, III, James P. Cousounis, Philadelphia, Pa., Charles C. Hileman, Richard S. Mailman, Wyncote, Pa., for defendants.

Appendix G

MEMORANDUM AND ORDER

BECHTLE, Chief Judge.

Presently before the court is the motion of defendants and intervening defendant for a stay of the injunctive relief entered by this court's April 5, 1990 Order 735 F.Supp. 1274, pending appeal before the Court of Appeals for the Third Circuit. The April 5, 1990 Order declared unconstitutional the minority, female and handicapped set-aside programs set forth at Chapter 17-500 of the Philadelphia Code [the "Ordinance"] and permanently enjoined the defendants from enforcing or implementing the Ordinance.

As will be discussed below, contracts that are part of the city procurement process pass through various stages prior to becoming finally executed contracts binding on both parties. This memorandum addresses the appropriateness of a stay with regard to all types of city contracts to which Chapter 17-500 has been applied in each of these various stages, including: contracts for which the city is contemplating advertising or soliciting bids; contracts that are currently being advertised; contracts that are "on the street;" contracts that have been opened but not awarded; contracts that have been awarded but not yet signed by a city official; and contracts that have been signed (and thus fully executed) on *April 5, 1990 or thereafter.*

This memorandum does not address contracts that were awarded and fully executed — those contracts that the city has signed and on which it has become legally obligated—*prior to April 5, 1990.* The city was contractually bound on these contracts prior to the courts ruling, and thus, in the absence of an extraordinary showing to the contrary, these contracts are

not subject to the injunction issued in the court's April 5, 1990 Order. Thus, by this Memorandum and Order, the court does not address the appropriateness of a stay with regard to those contracts executed prior to April 5, 1990.

Rule 62(c) of the Federal Rules for Civil Procedure authorizes a trial court to suspend, modify, restore, or grant an injunction during the pendency of an appeal in injunction cases. Fed.R.Civ.P. 62(c). A trial court has complete discretion to decide whether a stay pending appeal of an injunction is appropriate. *Id.* It is generally required that to obtain a stay of an injunction pending appeal the moving party (defendants) must show: (a) the likelihood of success on the merits of the appeal; (b) irreparable injury to the party seeking the stay from denial of a stay; (c) no substantial harm to the opposing party, and (d) the public interest favors the grant of a stay. *See Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 2119, 95 L.Ed.2d 724 (1987). The application of these factors contemplates individualized judgments in each case. *Id.* at 777, 107 S.Ct. at 2119. If the court is satisfied that these considerations or other relevant considerations indicate that an injunction should be stayed pending appeal, a stay will be granted. Otherwise the stay will be denied. 11 Wright & Miller, Federal Practice and Procedure § 2904 (1973).

The defendants have requested a stay with regard to three types of contracts: supplies, services and equipment; public works; and professional services. Because the analysis of the appropriateness of a stay varies depending on the stage of the procurement process, the court will briefly outline the process in each of the three types of contracts.

Contracts for supplies, services and equipment and contracts

for public works are both part of the bidding process, and the procedure is essentially the same. Contracts for supplies, services and equipment pass through the following stages: the office of procurement requests a description of the product; the product is advertised for two weeks (if valued greater than $2,000); the bids are opened publicly and read (generally about four weeks later, although this varies); the bids are evaluated for award; the award is granted; a city official signs the award, thereby obligating the city on the contract. Contracts for public works are procured as follows: the operating department develops specifications; the project is advertised for two weeks; bid opening is scheduled; bids are opened; bids are evaluated; the operating department makes a recommendation on an award; the office of procurement decides on the award; a city official signs the award, thereby obligating the city on the contract.

Contracts for professional services are not awarded through a bidding process. The city solicitor's office oversees the letting of these contracts. They are awarded as follows: a request-for-proposal is sent out or the contract is advertised or issued to interested partes; the solicitor's office decides the award; the award is executed.

Because contracts for supplies, services and equipment and for public works are both awarded through the bidding process, and accordingly pass through the same stages, the court will examine them together to determine the appropriateness of a stay in the various stages.

A district court may grant a stay pending appeal if an examination of the four factors stated above appears, in the court's discretion, to warrant a stay. First, the defendants must make a strong showing that they are likely to succeed on the

merits on appeal. At the April 11, 1990 hearing on defendants' motion for a stay pending appeal, defendants thoroughly outlined for the court their arguments as to why this court's Order was incorrect. For the reasons explained in the court's 89-page Order entered on April 5, 1990, it is the court's belief that defendants have little likelihood of success on the merits.

Second, defendants must show that no substantial harm will come to other interested parties. The court's April 5, 1990 Order permanently enjoined defendants from enforcing the minority, female and handicapped set-aside programs set forth at Chapter 17-500 of the Philadelphia Code as a result of the court's finding that the Ordinance violated the plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. As part of that ruling, the court declared the Ordinance unconstitutional. To approve a stay would enable the defendants to continue to enforce an Ordinance that is, in the court's analysis, a violation of the plaintiffs' constitutional rights. The court thus cannot agree that granting the stay will bring no substantial harm to other interested parties.

Third, defendants have the burden of showing that they will suffer irreparable injury unless a stay is granted. Defendants have shown the court, through charts as well as live testimony, that the court's ruling will effect approximately 2,027 bids in both services, supplies and equipment and public work categories, valued at a total of approximately $73,533,000. The court agrees that these are large numbers, and understands that this may inconvenience the city. However, the court believes that more is needed to meet the irreparable injury requirement of Fed.R.Civ.P. 62(c).

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With regard to contracts that are not yet advertised, failure to grant a stay will not cause defendants irreparable injury. Presumably, the only action defendants need take with respect to contracts not yet advertised to comply with the court's April 5, 1990 Order would be to write the advertisement without any reference to a minority, female or handicap set aside requirement. This places a minimal burden, if any, on city resources. For bids that have already been advertised, the city can issue a "change order" simply deleting any reference in the advertisement to the set-aside requirement. In addition, the city can issue a change in any general advertisements, stating that contractors bidding on city contracts no longer need comply with the set-aside requirements.

With regard to bids "on the street," the stage where contractors are notified that bids are ready for pickup and a bid opening date is set, the city can also comply with the injunction by sending out an "addendum" or a change order. Angela Dowd-Burton, Procurement Commissioner for the City of Philadelphia, testified that issuing "change orders" is a relatively easy, routine practice that the city undertakes whenever there has been a change in the bid requirements. The city maintains lists of bidders for the very purpose of notifying bidders through an "addendum" should any change arise. Although Ms. Dowd-Burton testified that there are approximately 160-200 bids "on the street," the court finds that issuing the appropriate change orders would impose little administrative inconvenience, as it is routinely done when the need arises, and places a minimal financial burden on the city. Although a delay in the bidding process may arise because of the need to suspend bidding while the change is advertised and then to later reactivate bidding, the court finds that this delay, probably less than four to six weeks, does not rise to the level of irreparable injury. As evidence of

this, Ms. Dowd-Burton in her testimony about the school lunch program, a project involving the delivery of lunch to children in the area for summer 1990, stated on cross-examination that there would be "no difficulty at all" in sending addendum to the six bidders notifying them that compliance with Chapter 17-500 is no longer necessary. Ms. Dowd-Burton indicated that the delay in the process would amount to approximately one week.

For bids that are "opened," (*i.e.*, bids that have been publicly opened), and thus in the process of being awarded, the court agrees that a stay could be awarded based on a showing of irreparable injury. The court agrees that at the "opening" stage, the bidding process is well underway and there may be sufficient reliance on the time and effort expended in the decision regarding the award that the defendants would suffer irreparable injury should the injunction be enforced. However, defendants presented the court with no such evidence of irreparable injury. It is not the court's obligation under Fed.R.Civ.P. 62(c) to construe irreparable injury from information the court may have about the procurement process; rather, it is the defendants' burden to affirmatively show irreparable injury. Defendants have not done so.

At the stage where bids have been awarded, the contractor has and all that is required is the city official's signature, the court also can envision hardship for the defendants where the city would be required to enforce the injunction. As with bids that have been opened but not yet awarded, the court concedes that at such a late stage the administrative burden, cost, or delay may be so great that the city could show irreparable injury. However, no such showing was made. Simply telling the court that there are numerous the contracts at this stage does not satisfy requirement that defendants prove irreparable injury.

Finally, the city could perhaps have demonstrated irreparable injury with regard to any contracts that have been signed by the city (on which the city has become contractually bound) after April 5, 1990. However, the city presented no testimony to the court describing why rebidding contracts after they have been signed would cause irreparable injury. Had they presented such evidence, a stay with respect to this category of contracts may have been warranted.

The city also seeks a stay of the court's April 5, 1990 order as it impacts contracts for professional services. Barbara Potts, Chief Deputy Solicitor for the City of Philadelphia, testified before the court at the April 11, 1990 hearing on the subject of professional services contracts on behalf of the City Solicitor's Office — the department that awards this type of contracts. Ms. Potts told the court that approximately 218 contracts with the city involve professional services, at a total value of more than $99,000,000. Ms. Potts was not aware of the number of contracts for which request-for-proposals are being advertised now, or that had been issued prior to April 5, 1990. Ms. Potts did state that to comply with the injunction the city must do more than simply cease applying the Ordinance, because there may be some contracts outstanding that non-minority contractors may have sought but for the Ordinance. However, Ms. Potts did not tell the court how the city could comply with the Order, or what burden compliance would place on the city. When asked what impact suspension of the operation of the Ordinance would have on the city, Ms. Potts had no response. She did, however, mention that some contracts may need to be re-let, whereas those with amendments could easily be changed.

The court finds that, although Ms. Potts' testimony did

provide the court with information on the awarding of professional services contracts, it did not affirmatively demonstrate the irreparable injury necessary to merit a stay of this court's Order with respect to professional services contracts. In so finding, the court understands the potential inconvenience and burden, the injunction may be causing the city, at least with respect to contracts far along in the procurement process. However, the irreparable injury requirement demands much more of a party seeking a stay pending appeal than simply asking the issuing court to infer the alleged harm caused by its injunction.

The final factor the court must consider is whether the public interest favors a stay. The court's analysis of this factor has little impact on its decision regarding the stay. The intervening defendant suggests that the injunction will force many minority business enterprises out of business.[1] If that were true, certainly the public interest would dictate against enforcement of the court's Order. However, as discussed, because the court found that the Ordinance was unconstitutional, continuing enforcement of it would also be contrary to the public interest. In particular, enforcement of the Ordinance is certainly adverse to the interests of the non-minority contractors who have shown to the court that the Ordinance caused them injury in fact. Because the public interest factor cuts both ways depending on the perspective, it does not persuade the court that a stay is appropriate.

Because the court does not find that defendants have a likelihood of success on the merits on appeal, the defendants have not demonstrated irreparable injury from denial of a stay,

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1. However, the intervening defendant presented no evidence to support this assertion.

and granting a stay would cause substantial harm to the plaintiffs, the court will deny the defendants' motion for a stay pending appeal.

An appropriate order will be entered.

APPENDIX H — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA DATED APRIL 5, 1990

CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, INC., General Building Contractors Association, Inc., Associated Master Painters & Decorators of Philadelphia, Inc., Employing Bricklayers Association of Delaware Valley, Inc., Interior Finish Contractors Association of Eastern Pennsylvania, Inc., National Electrical Contractors Association, Inc., Roofing and Sheet Metal Contractors Association of Delaware Valley, Inc., and Subcontractors Association of Delaware Valley, Inc., Plaintiffs,

v.

CITY OF PHILADELPHIA, Elizabeth Reveal, as Director of Finance for the City of Philadelphia, and Curtis Jones, Jr., as Director of the Minority Business Enterprise Council, Defendants,

and

United Minority Enterprise Associates, Inc., Intervening Defendant.

Civ. A. No. 89-2737.

United States District Court,
E.D. Pennsylvania.

April 5, 1990.

* * *

Appendix H

John J. McAleese, Jr., Thomas J. McGoldrick and John H. Widman, King of Prussia Pa., for plaintiffs.

Carl Vance Johnson Norman, President/CEO, MIS-ATSE Financial Corp., Philadelphia, Pa., amicus-curiae.

Charisse R. Lillie, Philadelphia, Pa., for development Authority of the City of Philadelphia.

Seymour Kurland, Charles W. Bowser, Luther E. Weaver, III and James P. Cousounis, Baskin Flaherty Elliott & Mannino, P.C., Philadelphia, Pa., and Charles C. Hileman and Richard S. Mailman, Wyncote, Pa., for defendants.

Robert T. Vance, Jr., Philadelphia, Pa., for United Minority Enterprise Associates, Inc.

Carl E. Singley, Philadelphia, Pa., for Philadelphia Urban Coalition Philadelphia Urban League Minority Enterprise Development Committee.

MEMORANDUM AND ORDER

BECHTLE, Chief Judge.

Presently before the court are cross-motions for summary judgment on the question of whether the city of Philadelphia's minority, female and handicapped set-aside program is valid in light of the decision of the United States Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989).

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I. INTRODUCTION

On April 14, 1989, nine incorporated associations of construction contractors that have participated as general contractors or subcontractors on city of Philadelphia construction projects instituted this action against the city of Philadelphia, Elizabeth Reveal, Director of Finance for the city of Philadelphia, and Curtis Jones, Jr., Director Of the Minority Business Enterprise Council to have Chapter 17-500 of the Philadelphia Code (hereinafter "the Ordinance") and the Minority Business Enterprise Council (hereinafter "MBEC") regulations declared invalid. The United Minority Enterprise Associates, Inc. intervened in this litigation as a defendant. For the reasons discussed below, the court finds that the Ordinance violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, and will accordingly grant plaintiff's cross-motion for summary judgment.

In the amended complaint the plaintiffs allege that the Ordinance imposes upon covered city contracts classifications based on race, ethnicity, gender and handicap in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution (Count I); title 42 U.S.C. § 1983 (Count II); title 42 U.S.C. § 1981 (Count III); article 1, § 26 of the Pennsylvania Constitution (Count IV); article 1, § 28 of the Pennsylvania Constitution (Count V). Plaintiffs claim that these classifications based on race and ethnicity do not withstand the strict scrutiny test announced by the Supreme Court in *City of Richmond v. J.A. Croson Co., supra,* and that the gender- and handicap-based classifications violate the lesser standards of review articulated by the Supreme Court. Plaintiffs also allege that the Ordinance violates title 73 P.S. § 1622 of the

Pennsylvania Code, which requires the city to accept the lowest responsible bid in city contract awards, as the Ordinance requires the rejection of a bid submitted by the lowest responsible bidder on a covered contract exceeding $50,000.00 for the construction, reconstruction, alteration or repair of any public building, public work or other public improvement for noncompliance with the requirements of the Ordinance and the MBEC regulations (Count VI). Finally, Count VII alleges that the Ordinance violates § 8-200 of the Philadelphia Home Rule Charter, insofar as it requires the rejection of a bid submitted by the lowest responsible bidder on a covered contract exceeding $2,000 for noncompliance with the requirements of the Ordinance.

Defendants respond that the plaintiff contractors' associations lack standing to pursue their federal equal protection and civil rights claims (Counts I through III) and that they fail to allege facts sufficient to establish that the Ordinance deprived them of their constitutional rights.

To resolve the issues presented in the parties' cross-motions this opinion will recount the stipulated facts (part I), set forth the standard for summary judgment (part II, section A), address the standing issue (part II, section B), discuss the standard with which affirmative action programs must comply as set forth in *Croson* (part II, section C), and analyze the merits of plaintiffs' claims by examining whether the Philadelphia city council has met its burden under Croson (part II, section D).

II. UNDISPUTED FACTS

The parties submit that the material facts that form the basis for this litigation are not in dispute. The undisputed facts are as follows.

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On May 13, 1982, the Philadelphia city council passed over Mayor Green's veto Bill No. 1174-A ("an ordinance amending Title 17 of the Philadelphia Code by adding Chapter 17-400, establishing goals for the participation of Minority and Female Owned Businesses [hereinafter "MBE" and "FBE"] in the awarding of city contracts including but not limited to supplies and services, equipment, materials and public works construction; establishing a Minority Business Enterprise Council; providing procedures and penalties to monitor and enforce compliance"). As stated in the preamble, one of the goals of the Ordinance, is "to encourage participation in the awarding of city contracts for supplies and services, equipment, materials and public works construction regardless of race, color, sex, religion, national origin, or ancestry." The preamble also states that the most important intent and purpose of the Ordinance is "the Economic Development of the minority and female owned business community through a 'sheltered market' process." Among the stated reasons for the Ordinance is "[a] pattern of past and present racial, sexual and economic discrimination" in the awarding of contracts with the city of Philadelphia. Preamble, Bill No. 1174-A.

The Ordinance provided that it "shall be applied to all City Contracts and all City Departments, Agencies, Authorities, Commissions and Councils." § 17-402. The Ordinance established the following MBE and FBE participation goals:

> (a) Fifteen percent (15%) City Contract participation for [MBEs]; and
>
> (b) Ten percent (10%) City Contract participation for [FBEs].

The above stated percentages relate to the total dollar amount of City Contracts during each of the City of Philadelphia's Fiscal Years.

§ 17-403.

The Ordinance defines "MBE" as:

(a) A sole proprietorship where the sole proprietor is a minority person; or

(b) A business corporation where 51% of the interest in such corporation are beneficially owned by minority person(s) and minorities occupy the majority of management and Board positions and control all decisions concerning the corporation; or

(c) A partnership where 51% of the partnership interest in such partnership are beneficially owned by minority person(s) and minorities occupy the majority of management and partnership positions and control all decisions concerning the partnership; or

(d) Any other business or professional entity where 51% of the interest are beneficially owned by minority person(s) and minorities occupy the majority of management and Board positions and control all decisions concerning the entity.

§ 17401(l).

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Under the Ordinance, the term "minority person" includes "Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans . . ." § 17-401(5). The definition of "FBE" is the same as that of "MBE", except that it replaces all references to minority person(s) or minorities with woman or women. § 17-401(2).

The Ordinance also created a Minority Business Enterprise Council (MBEC) to help implement, monitor and enforce its goals. Under the Ordinance, the MBEC is, *inter alia*, required to devise a certification procedure to assure that businesses taking advantage of the Ordinance are legitimate MBEs or FBEs. § 17-404(a). The MBEC was also given the responsibility of ascertaining the total number of MBEs and FBEs in the Philadelphia area. § 17-404(b). In addition, the MBEC was also required to devise policies, regulations and procedures for assuring the participation of MBEs and FBEs in various city contracts. § 17-404(e).

On November 4, 1982, Mayor Green approved Bill No. 1477 (an Ordinance amending Chapter 17-400 by renumbering it to Chapter 17-500 *et seq.*, and by making certain additions and deletions). The amended Ordinance set forth a revised definition of "minority persons":

> "A person who is a citizen or lawful permanent resident of the United States and who is:
>
> (a) Black (a person having origins in any of the black racial groups in Africa);

> (b) Hispanic (a person of Spanish or Portuguese culture with origins in Mexico, South or Central America, or the Caribbean Islands, regardless of race);
>
> (c) Asian American (a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent or the Pacific Islands); or
>
> (d) American Indian or Alaskan Native (a person having origins in any of the original peoples of North America.)"

§ 17-501(l).

The definitions for "MBE" and "FBE" in Bill 1477 were textually similar to those provided in the May 1982 Ordinance except for replacing "minority persons" for "minority person(s)" or "minorities" and "female" for "women" and "woman". § 17-501(3) and (4). In addition, the amendments created a "sheltered market," defined as a city-wide procurement system whereby certain contracts are selected and specifically set aside for MBEs or FBEs, or both, on a competitive bid or negotiated basis. § 17-501(5).

The amended Ordinance also provided that the goals announced in § 17-503(l) are not to be construed as absolute upper limits on the amount of city contracts in which MBEs and FBEs are able to participate, and stated that the goals are applicable to all types of city contracts. In addition, the amended Ordinance added subsection (2) to § 17-503 (formerly § 17-403), which described under what circumstances the total dollar

amount of a subcontract, contract up to a million dollars, or contract over a million dollars shall be counted towards MBE or FBE participation for purposes of calculating the fifteen and ten percent figures in § 17-503(l).

The amendments also gave the MBEC the authority to recommend that an entire class of contracts established pursuant to § 17-503 be exempt from MBE and FBE city contracting goals when there has been a written determination based on the best information available that there is an insufficient number of qualified MBEs or FBEs in the Philadelphia area to ensure adequate competition and an expectation of reasonable prices on bids or proposals within that class. § 17-505(2)(a). The MBEC also has authority under § 17-505(3) to grant a waiver to a contractor who was unable to comply with the established goals for MBE or FBE participation but has demonstrated that there has been a good faith effort to comply. Section 14-504(e) authorizes the MBEC by regulation to define the specifics of the sheltered market program.[1]

On May 20, 1987, the Mayor approved Bill No. 1260, an ordinance amending Chapter 17-500. The 1987 Ordinance was refocused to provide for increased participation in city contracting of "Disadvantaged Business Enterprises" [hereinafter "DBEs"] rather than for MBEs or FBES. However, the 1987 Ordinance maintained the same percentage

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1. Part 11 of the Regulations establishes this sheltered market program. The sheltered market is separate and apart from the set-asides established in the Ordinance. Part 11 authorizes the setting aside of certain prime contracts for participation only by M-DBEs, F-DBEs and H-DBEs. Neither Chapter 17-500 nor the Regulations limit the amount and number of contracts that may be reserved by the city for this sheltered market.

participation goals for MBEs and the FBEs as specified in the 1982 Ordinance. § 17-503(1).[2]

The 1987 Ordinance amended the definition of "minority person" to substitute "Native American" for "American Indian or Alaskan Native". It also added the following definitions:

> (a) Small business shall mean a business which is independently owned and operated and which is not dominant in its field of operation as further defined in 13 Code of Federal Regulations, Part 121.3, incorporated herein, and made a part by reference . . .
>
> (b) Disadvantaged business enterprise or "DBE" shall mean any small business;
>
> (a) Which is at least fifty-one percent (51%) owned by one or more-socially and economically disadvantaged individuals or
>
> (b) In the case of any publicly owned business, one in which at least fifty-one percent (51%) of the stock is owned by one or more socially and economically disadvantaged individuals.

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2. Because the city council maintained separate participation goals for MBEs and FBEs, these labels remain relevant. Accordingly, the court will generally refer to the preferred classes by these designations. However, the designations "minority-disadvantaged business enterprise" [M-DBE] and "female-disadvantaged business enterprise" [F-DBE] will sometimes be used.

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Where a business has received more than Five Million Dollars ($5,000,000) of contract work with the City under this Chapter, the [MBEC] shall make a rebuttable presumption that the concern is not a disadvantaged business enterprise, and any previous certification as a [DBE] shall be re-evaluated pursuant to regulations to be promulgated by the MBEC.

Socially and economically disadvantaged individuals shall mean those individuals who have been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business who are not socially disadvantaged.

> (a) In determining who are socially and economically disadvantaged individuals, the [MBEC] may make a rebuttable presumption that all minority persons and all women shall be so classified.
>
> (b) The [MBEC] in making said determination, shall also consider, among other things, the extent of the liquid assets and net worth of such socially disadvantaged individuals.

Finally, on October 26, 1988, the Mayor approved Bill No. 108, an Ordinance amending Chapter 17-500 of the Philadelphia Code by establishing city contract participation goals for handicapped persons. The 1988 amendments revised the definition of "socially and economically disadvantaged individuals" in § 17-501(11) to read:

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> Socially and economically disadvantaged individuals shall mean those individuals who have either been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap . . .

§ 17-501(11). The Ordinance added a definition of "handicapped person", to wit:

> . . . a person who has a physical or mental impairment which substantially limits one or more of his or her major life activities or has a record of such an impairment. Major life activities shall mean functions, such as caring for oneself, performing manual tasks, walking seeing, hearing, speaking, breathing: learning and working.

§ 17-501(12). The Ordinance also added a definition of "Handicapped-Owned Business" [hereinafter "HBE"] equivalent to that for MBEs and FBEs, except that it replaced references to "minority persons" or "female" with "handicapped persons(s)". § 17-501(13). Lastly, the Ordinance amended the section to read, in pertinent part:

> The goals shall be:
>
> > (c) Two percent (2%) City contract participation for Handicapped Owned Businesses.

§ 17-503(1).

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III. DISCUSSION

A. Summary Judgment Standard

The function of a motion for summary judgment is to avoid a trial in cases where it is unnecessary and would only cause delay and expense. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed.2d 748 (1977). In evaluating a motion for summary judgment, the court may examine the pleadings and other materials offered by the parties for the purpose of determining if there is a genuine issue of material fact to be tried. Fed.R.Civ.P. 56(c). *Sims v. Mack Truck Corp.*, 488 F.Supp. 592, 597 (E.D.Pa.1980). The United States Supreme Court has directed that summary judgment "shall be rendered forthwith" if it appears from an application of substantive law to the uncontroverted facts that the movant is entitled to judgment as a matter of law. *Id. See also Celotex Corp v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986).

In considering a motion for summary judgment, the court must determine whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show there is no genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.1987) (*en banc*); *Arnold Pontiac-GMC, Inc. v. General Motors* Corp., 786 F.2d 564, 568 (3d Cir.1986). "As to materiality, the substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue is "genuine" only if the evidence is such that a reasonable jury could find for the non-moving party. *Id.*

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The burden to demonstrate absence of material fact issues remains with the moving party regardless of which party would have the burden of persuasion at trial. If, however, the non-movant will bear the burden of persuasion at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the non-movant's burden of proof at trial. Fed.R.Civ.P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. at 327, 106 S.Ct. at 2554.

A party resisting a Fed.R.Civ.P. 56 motion cannot expect to rely upon bare assertions, conclusory allegations, or a mere cataloguing of affirmative defenses to defeat summary judgment. *Celotex, supra,* 477 U.S. at 323-24, 106 S.Ct. at 2552-53; *Gans v. Mundy,* 762 F.2d 338 (3d Cir.1985). Once the moving party has presented evidence which would require a directed verdict a trial, the burden shifts to the opposing party to respond with specific facts showing that a genuine issue for trial exists. If the non-moving party does not so respond, summary judgment, if appropriate, shall be entered against them. Fed.R. Civ.P. 56(e); *Anderson v. Liberty Lobby, Inc., supra,* 477 U.S. at 247-48, 106 S.Ct. at 2509-10.

B. Plaintiffs' Standing

Defendants claim that the plaintiff contractors' associations do not have standing to challenge the constitutionality of the Ordinance. The plaintiffs allege no injury to the associations themselves, but rather claim that individual members of the associations have been harmed by the Ordinance. Thus, the court must inquire whether the nine contractors' associations may proceed solely as representatives of those of its members that have been injured by the Ordinance.

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The United States Supreme Court has addressed the issue of when an association may have standing on behalf of its members. It is well-settled that "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members." *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, et al. v. Brock*, 477 U.S. 274, 281, 106 S.Ct. 2523, 2528, 91 L.Ed.2d 228 (1986); *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 2211, 45 L.Ed.2d 343 (1975).

The Court has ruled that such representational standing, while it "does not eliminate or attenuate the constitutional requirement of a case or controversy" *id.*, is permissible under Article III under certain circumstances. *International Union*, 477 U.S. at 281, 106 S.Ct. at 2528. In *Warth*, the Supreme Court described the circumstances in which an association may litigate in federal court on behalf of its members:

> The association must allege that its members, or any one of them are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. . . . So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party dispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction. *Warth*, 422 U.S. at 511, 95 S.Ct. at 2211.

The Supreme Court later expressed this doctrine in a three-part test:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977).

To determine whether the plaintiff associations in this case have met the requirements enunciated in Hunt, this court will examine each of the three components. Preliminarily, the court notes that in ruling on a motion for summary judgment for want of standing, the court must accept as true all material allegations of the amended complaint, and must construe them in favor of the complaining party. *Warth,* 422 U.S. at 502, 95 S.Ct. at 2207.

1. *Standing of Members under Article III of the United States Constitution*

The associations must show that their members would otherwise have standing to sue in their own right by demonstrating that they meet the requirements of Article III of the United States Constitution (hereinafter "Article III"). To do so, the members must assert a personal stake in the outcome of the controversy demonstrating that they have sustained an injury in fact, *see Warth,* 422 U.S. at 498-99, 95 S.Ct. at 2204-05, and

show that their injury was caused by the putatively illegal action of the defendant, *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 99, 99 S.Ct. 1601, 1607, 60 L.Ed.2d 66 (1979) such that the injury "fairly can be traced to the challenged action of the defendant." *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 41, 96 S.Ct. 1917, 1925, 48 L.Ed.2d 450 (1976).

The injury in fact requirement is designed to ensure that the dispute will be put in the hands of those who have a direct stake in the outcome *Sierra Club v. Morton,* 405 U.S. 727, 740, 92 S.Ct. 1361, 1369, 31 L.Ed.2d 636 (1972). It provides the court with "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult constitutional questions." *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). In this context, the *Warth* court specified that where the plaintiff is an association, it "must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action." *Warth,* 422 U.S. at 511, 95 S.Ct. at 2211.

The plaintiffs have shown that they represent associations of construction contractors, all of whom have members who have participated either as general contractors or subcontractors on city of Philadelphia construction projects. They have also shown that the Ordinance requires those bidders on covered contracts that are not MBEs, FBEs or HBEs to commit to subcontract at least 15% of their contract amount to MBEs, at least 10% to FBEs and at least 2% to HBEs. In addition they have shown that there is a certain number of contracts set aside for bidding only by MBEs and FBEs ("sheltered market"). They have also alleged that the Procurement Department and the

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MBEC must reject any bid on a covered contract that fails to commit to the percentage participation requirements, regardless of whether that bid is submitted by the lowest responsible bidder. Plaintiffs claim that as a result of the Ordinance their members have been excluded from bidding on sheltered market contracts; have been required to subcontract work or enter into joint ventures with MBEs and FBEs at greater expense than they would have incurred had they performed the work with their own forces or subcontracted the work to the lowest responsible bidding subcontractor; and have been disqualified from participating on covered contracts despite having submitted the lowest responsible bid.

Defendants argue that despite these allegations plaintiff associations have failed to satisfy the injury in fact requirement because they have not shown the existence of any injury to its members of sufficient immediacy and ripeness to warrant judicial intervention. Specifically, defendants point to the associations' failure to allege any of the following: a specific member's loss of an opportunity to bid on a specific city contract; a specific member's loss of an award of a specific city contract on which that member bid; the precise extra expenses incurred by a specific member in the performance of a specific city contract; or specific city contracts on which identified members incurred greater expense by subcontracting the work to comply with the DBE participation requirements rather than by performing the work themselves.

Although the court could infer from the information provided in the complaint that the members have been injured by the operation of the Ordinance, the court agrees with defendants that to meet the injury in fact requirement the associations must show the injury suffered by their members

with some specificity. To this end, members of six of the nine contractors associations have submitted affidavits detailing the nature of their injury under the Ordinance. The affidavits submitted by members of four of these associations provide information on the injury suffered with sufficient particularity to persuade the court that they meet the Article III requirement of injury in fact.[3] These statements indicate to the court that members of these four plaintiff associations have been injured, and the court finds that their injuries provide the court with the best possible facts to "illumin[ate] . . . [the] difficult constitutional questions" before it. *Baker v. Carr*, 369 U.S. at 204, 82 S.Ct. at 703.

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3. (1) Stephen Colanero, a member of CAEP, stated that he was the lowest responsible bidder on project no. S9-CP3490, but that since he was unable to obtain quotes from qualified MBEs and FBEs to satisfy the participation requirement, and because the MBEC denied his request for a waiver, his bid was disqualified. (2) Charles E. Furtaw, a member of EBA, stated in his affidavit that he was advised by many prime contractors that he could not be used as a subcontractor because of the participation requirements of the Ordinance. In addition, he stated he was forced to refrain from bidding on city projects because the set-asides made the cost of estimating the work prohibitive. (3) James J. Clearkin, Jr., a member of GBCA, stated that since 1984 he has generally refrained from bidding on city contracts because, despite good faith efforts, he was unable to comply with the MBE and FBE participation requirements. However, he did prepare a bid on project 2085, but was unable to submit it because he could not satisfy the MBE participation requirement. (4) Mark L. Strong, a member of SADV, stated by affidavit that he would have received a subcontract on a project involving Terminal A of the Philadelphia International Airport, for which he was the lowest bidder, if it were not for the MBE and FBE requirements. In addition, Mr. Strong stated that he would have bid on a project involving the installation of closed circuit television networks but for the fact that the project was reserved or sheltered market bidders. Finally, Mr. Strong stated that his costs were $42,000 on another bid, project no. 4325R, as a result of the set-aside requirement.

Of the five other associations, members of the NECA and RSMCA also submitted affidavits. These affidavits essentially stated that the members of the associations were notified of the litigation and did not object to it. The members also provided requests for bids on city projects and stated that they generally bid on these types of projects. These affidavits do not provide sufficient details of the injury suffered to meet the Article III requirement. The court acknowledges that members of NECA and RSMCA may have suffered injuries similar to those documented in the affidavits submitted by members of CAEP GBCA, EBA and SADV, *see supra* n. 4, however such a supposition is too speculative to meet the injury in fact requirement. The court simply cannot infer that plaintiffs have met this requirement; nor will it fill gaps to enable plaintiff to do so. Thus, the court finds that, on the record before it, NECA and RSMCA do not have standing to challenge the constitutionality of Chapter 17-500.

Finally, because members of MCAEP, IFCA and AMPD did not submit affidavits detailing their injury and since the allegations in the complaint fail to specify the injury with sufficient particularity, these three associations do not have standing to litigate the constitutionality of the Ordinance. Thus, the court will proceed in the analysis of the issues presented by this litigation with CAEP, GBCA, EBA and SADV as named-plaintiffs. Hereinafter, the term "plaintiffs" or "plaintiff associations" will refer only to these four contractor associations.

The court notes that the declaratory relief provided by the court will apply to the five associations that are no longer named plaintiffs in this action. In addition, this determination that NECA, RSMCA, AMPD, IFCA and MCAEP do not have standing on this record does not prevent these associations from

demonstrating at a later date the necessary injury in fact to attain standing.

The court also finds that the plaintiffs have met the causation requirement of Article III. Again, members of plaintiff associations have shown that despite having submitted the lowest responsible bid, the bids were rejected as a result of the members' inability to meet the requirements of the Ordinance. Other cases in this district have found that an allegation such as this meets the causation prong of the Article III test. *See Main Line Paving Co. v. Bd. of Educ., School Dist. of Philadelphia,* 725 F.Supp. 1349, 1353 (E.D. Pa.1989).

Taken together, the allegations in the amended complaint and the affidavits show that plaintiffs' members have standing in their own right. As did another district court in this circuit when examining similar facts, the court finds that the alleged effect this Ordinance has had on contractors doing business on city of Philadelphia projects are "real and sufficient to assure a concrete controversy and aggressive presentation of the constitutional question." *See Contractors Association of Western Pennsylvania v. Kreps,* 441 F.Supp. 936, 946 (W.D.Pa.1977). The Third Circuit has acknowledged that such contractors are "those most likely to have suffered injury" by the operation of a set-aside Ordinance like the one at issue here. *Rocks v. City of Philadelphia,* 868 F.2d 644, 648 (3d Cir. 1989). Finally, the court does not find that the first prong of the *Hunt* test requires that *each and every* member of a plaintiff association show injury in fact. Supreme Court cases construing *Hunt* have made it clear that it is sufficient if some of the members have shown that they have been injured by the putatively illegal conduct. In *International Union, et al v. Brock,* 477 U.S. 274, 106 S.Ct. 2523, 91 L.Ed.2d 228 (1986) the Supreme Court ruled that the plaintiff

Union had standing because "at least some members of the UAW would have had standing to bring this suit in their own right." *Id.* at 288, 106 S.Ct. at 2532.

2. *Germaneness*

The second *Hunt* requirement does not appear to be at issue, and there is little question that the interests plaintiff associations seek to protect in this lawsuit are germane to the organization[s'] purpose." *Hunt*, 432 U.S. at 343, 97 S.Ct. at 2441. The following goals constitute the stated purpose of the plaintiff associations:

> . . . establishing and maintaining high standards of performance in the construction business and establishing its members in the public mind as contractors who fulfill obligations in good faith and with consummate skills; promoting relations between its members and purchasers of their services including the City of Philadelphia; representing the interests of its members respecting issues of significance to them as contractors; and eliminating waste and reducing the cost of construction.

Amended Complaint at 5. The interests sought to be protected by this lawsuit are the prevention of unlawful discrimination in the letting of city of Philadelphia contracts. Members of the associations have alleged that this discrimination has caused an increase in the cost of compliance with bidding specifications and has raised the cost of construction to the city. These purposes seem to this court to be squarely in line with the Associations' stated goals. A lawsuit challenging a set-aside requirement of

the Public Works Employment Act was found to be germane to the purpose of a contractors association in *R.L Chapter, Assoc. General Contractors v. Kreps*, 450 F.Supp. 338, 347 n. 10 (D.R.I.1978).

3. *No need for individual participation*

The defendants contend that the plaintiff associations cannot meet the third *Hunt* requirement because they have MBE, FBE and/or HBE members that presumably benefit from the Ordinance. Defendants argue that because some members of plaintiff associations would be harmed if the set-aside program is dismantled, the very goal of this litigation, there is an inherent conflict of interest that defeats standing.

The last of the *Hunt* requirements is designed to insure that the association itself can invoke the court's remedial powers, and that participation of individual association members is not necessary. The Supreme Court has denied standing for failure to meet this requirement in cases where the damages sought are not common to the entire membership, the damages are not shared by all in an equal degree, or where the fact and extent of differing injury would require individualized proof. *Warth*, 422 U.S. at 515, 95 S.Ct. at 2213.

The plaintiff associations before this court do not suffer from the same defects present in *Warth*. Plaintiffs seek a judgment declaring invalid Philadelphia's minority, female and handicapped business set-aside program. The matter of the Ordinance's constitutionality in light of *Croson* is a pure question of law, and thus similar to the matter before the Supreme Court in *Brock*. There the court considered whether the United Auto Workers had standing to bring suit against the Department of

Labor challenging the Department's policy of not permitting weeks in which employees draw nonregular wages to be considered a week of employment for purpose of determining eligibility for trade readjustment allowance benefits. The Court in *Brock* ruled that the UAW had satisfied the third *Hunt* requirement, finding that "[n]either th[e] claims nor the relief sought required the District Court to consider the individual circumstances of any aggrieved UAW member. . . . The suit raises a pure question of law: whether the Secretary properly interpreted the Trade Act's TRA eligibility provisions." *Brock*, 477 U.S. at 287, 106 S.Ct. at 2531.

The question of whether the Ordinance violates the Equal Protection Clause of the Fourteenth Amendment can be adjudicated without reference to the particular circumstances of members of the plaintiff associations. Typically, an association will be denied standing where the evidence required to prove liability or define the appropriate remedy is peculiar to each member injured by the challenged conduct. *Warth*, 422 U.S. at 515, 95 S.Ct. at 2213. Generally, this arises where monetary damages are claimed that may differ from member to member. However, where proof peculiar to a particular member is not required on the liability or remedy issues, an association properly may maintain the action on behalf of one or more of its injured members. *Id.* Plaintiff associations have sought declaratory relief not damages, and thus there is no need for participation by individual members. *See R.I. Chapter*, 450 F.Supp. at 347, n. 3. The fact that some of the members may have suffered more actual damages than other members is not a bar to standing because the court can decide the constitutionality of the Ordinance without regard to proof of damages. Furthermore, the outcome of this suit by the associations has the same effect on any MBE, FBE or HBE member as would any facial attack brought by a single contractor on his or her own behalf.

Finally, the membership in plaintiffs associations of MBEs, FBEs or HBEs that may not be harmed by the Ordinance does not defeat the standing of the associations. As stated above, the issue before the court does not mandate an inquiry into damages sustained by individual members. In addition, the courts that have addressed this question of whether a potential conflict of interest among members of a plaintiff association over the subject of the litigation will defeat that association's organizational standing have indicated it does not, unless a majority openly opposes the association's position. In *NCAA v. Califano,* 622 F.2d 1382, 1391 (10th Cir.1980), the Tenth Circuit stated that if more members openly oppose the association's position in the litigation than openly favor it, then associational standing is lost. However, in that case many members of the plaintiff association (the NCAA) were also members of a women's intercollegiate sports association that was on the other side of the litigation. The conflict alleged in the case before this court does not approach that existing in *NCAA.*

Moreover, information provided to the court concerning the four plaintiff associations indicates that of a total of 535 members, only 29 are registered MBEs, FBEs or HBEs. Such a small percentage of potentially-unharmed members was found not to destroy the standing of a contractors association to challenge the constitutionality of a set-aside ordinance in *R.I. Chapter,* 450 F.Supp. at 347, n. 3. In addition, both parties acknowledge that each of the plaintiff associations has obtained authorization to commence this action. Finally, the case cited by the defendants for the proposition that a conflict of interest among the members of an association prevents that association from having standing, *AGC v. Otter Tail Power,* 611 F.2d 684 (8th Cir.1979), does not support defendants' argument. In that case, the Eighth Circuit did find an "obvious" conflict of interest

among the members' status and interest, however, the court denied organizational standing because it also found that the interests were so diverse that individual representation was required. Many of the cases denying organizational standing where there is a substantiated claim of a conflict of interest among members do so where proof of individual claims would be required to obtain the sought after relief. *See Harris v. McRae,* 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1979). As discussed above, no such individual representation is required in this case.

Although it is true that there are DBE members of plaintiff associations that may arguably be benefitted by the Ordinance, the court finds that the conflict created by their presence is too allusive to defeat standing. First, the court will not presume that the DBE members of plaintiff associations will be harmed by the possible invalidation of the Ordinance. There was testimony before the city council expressing concern over the growth of fraudulent M-DBEs and F-DBEs. *See* Transcript of Hearing before the Council of the City of Philadelphia, April 29, 1987, at 581 [hereinafter "Transcript"]. These businesses use a minority or woman owner as a front to enable non-minority and non-female DBEs to bid for covered contracts. If such fraudulent businesses are truly a problem as the city suggests, then the court will not assume that every DBE stands to be harmed by the dismemberment of the set-aside program.

For all of the reasons stated above, this court finds that plaintiffs CAEP, GBCA, EBA and SADV have demonstrated that they meet the three requirements for organizational standing set out by the Supreme Court in *Hunt*, and they accordingly have standing to litigate this law suit on behalf of their members.

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C. Croson Standard

In the past decade, the United States Supreme Court has struggled with the question of the appropriateness and validity of government-sponsored affirmative action programs in three cases: *Regents Of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986). However, in each of these cases the Court did not reach a majority consensus about the standard of review applicable to racial classifications, the purpose and evidence necessary to support such classifications, or the permissible scope of affirmative action plans. *Milwaukee County Pavers Ass'n v. Fiedler*, 707 F.Supp. 1016, 1021-22, *modified*, 710 F.Supp. 1532 (W.D.Wisc.1989). While the Philadelphia Ordinance presently before this court was in effect, the Supreme Court decided *Croson, supra*. Although the *Croson* decision resolves only some of these issues, it forms the basis for the analysis of plaintiffs' claims against the Philadelphia Ordinance. As will become evident, the parallels between the *Croson* case and this case are notable. The court will conduct a brief review of the Supreme Court's earlier affirmative action decisions to show the state of the law prior to *Croson*. The court will then discuss the *Croson* decision in greater detail, as the Philadelphia Ordinance will be held to the standard articulated in that case.

1. *Pre-Croson Decisions*

The District of Columbia Circuit cogently summarized the pre-*Croson* cases in *Shurberg Broadcasting of Hartford, Inc. v. F.C.C.*, 876 F.2d 902, 910-12 (D.C.Cir.1989), and the following is extracted therefrom.

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Bakke struck down a university admissions policy that set aside a fixed percentage of each class for minority candidates. Justice Powell's was the only opinion in the majority reaching the constitutional issue. He rejected the justification that a racial classification could be based on a mere desire to assure that the student body contain specific percentages of particular racial and ethnic groups. 438 U.S. at 307, 98 S.Ct. at 2757. He also rejected the use of a preference as a remedy for past discrimination, because the university had not made any such findings, and was not competent to do so. *Id.* at 307-09, 98 S.Ct. at 2757-58. However, Justice Powell did acknowledge that an academic institution has a compelling interest in promoting a diverse educational environment. *Id.* at 311-14, 98 S.Ct. at 2759-60. He stated that racial diversity is only one part of the "genuine diversity" that is a compelling state interest. *Id.* at 315, 98 S.Ct. at 2761. Thus, the university could have used race as one factor in a multi-factor admissions decision. Simply employing a racial set-aside was consistent with the goal of "genuine diversity," which requires consideration of factors other than race. *See id.* at 315-18, 98 S.Ct. at 2761-62.

In *Fullilove* the Court considered a facial challenge to the constitutionality of a setaside provision in an Act of Congress authorizing funding for public works construction. In his plurality opinion, Chief Justice Burger stressed Congress' unique constitutional authority under the Fourteenth Amendment to enact measures designed to remedy past discrimination. *See* 448 U.S. at 472-78, 100 S.Ct. at 2771-74. Justice Powell's concurrence stressed that Congress had made the finding of past discrimination in the public procurement process and had selected the particular remedy. *See id.* at 503-06, 100 S.Ct. at 2787-89. The Court discussed features of the legislative history and the implemented program, determined that the set-aside was

narrowly tailored to its remedial purpose, and upheld the program. Significantly, the Court found that the program was designed by Congress to assure that preference would be awarded only to disadvantaged minority enterprises who continue to suffer effects of past discrimination. The court also emphasized that the set-aside was likely to impose only a slight burden on nonminorities since it touched merely a small proportion of the total funds expended in the construction industry and because the effects were not concentrated on particular individuals. *See id.* at 484, n. 72, 100 S.Ct. at 2778, n. 72. (Powell, J., concurring).

Finally, in *Wygant*, the Court held unconstitutional a school layoff policy that accorded minority teachers a preference over nonminorities with seniority. The Court found that the school board had failed to establish evidence of past discrimination to justify remedial action. *See* 476 U.S. at 277-78, 106 S.Ct. at 1848-49. However, the Court relaxed its previous requirement that the governmental body make "findings" of discrimination, and instead authorized preferences to be predicated on "substantial evidence of discrimination." *Id.* at 289-92, 106 S.Ct. at 1854-56. The Court did reject flatly as a justification for the preferences the school's asserted need to provide minority role models because it had "no logical stopping point." *Id.* at 275-76, 106 S.Ct. at 1847-48. The Court held that the layoff provision was not narrowly tailored to achieve its remedial purpose because the hiring goal was calculated as a ratio of black teachers to black students, rather than as a ratio of black teachers to qualified minority teachers within the relevant labor pool. *Id.* at 294, 106 S.Ct. at 1857.

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2. *Croson Decision*

In *Croson,* the Supreme Court addressed the applicability of its prior decision in *Wygant v. Jackson Board of Education,* 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) to a minority set-aside program adopted by the city of Richmond.[4]

Part I of the *Croson* decision outlined the background of the Richmond set-aside program. In 1983 the Richmond city council adopted the Minority Business Utilization Plan [hereinafter "the Plan"], that required prime contractors on city construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more MBEs. This set-aside did not apply to minority-owned prime contractors. The Plan was structurally similar to the Ordinance under attack in this litigation. It defined an MBE as "[a] business at least fifty-one (51) percent of which is owned and controlled . . . by minority group members." *Croson,* 109 S.Ct. at 713. Minority group members were defined as "citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Id.* Richmond's set-aside was open to qualified MBEs from anywhere in the United States. The Plan claimed it was remedial in nature and enacted "for the purpose of promoting wider participation by minority business enterprises in the construction of public projects." *Id.*

Richmond's plan contained a waiver provision. The Director of the Department of General Services was directed to promulgate rules allowing waivers where a contractor can prove

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4. The *Croson* decision is written in several parts, each joined by different justices. Justice O'Connor's opinion constitutes the plurality opinion of the Court, and will be the basis of this court's analysis.

that despite every feasible attempt to comply with the Plan, the requirements could not be achieved.

The Richmond city council enacted the Plan after a public hearing at which five members of the public testified against the ordinance and two in favor. Supporters of the Plan relied on a study indicating that, while the general population of Richmond was 50% black, only .67% of the city's prime construction contracts had been awarded to MBEs from 1978 to 1983. The proponents of the set-aside provision also relied on evidence that many Richmond contractors' associations had virtually no MBEs as members, and testimony that there was widespread exclusion on the basis of race in the Richmond area, in the state, and around the nation. *Id.* at 714. The Richmond city council heard no direct evidence that the city had discriminated on the basis of race in letting contracts or that the city's prime contractors had discriminated against minority-owned subcontractors.

Part II examined the scope of the city's power to adopt legislation designed to remedy past discrimination. The Court rejected both Croson's argument that the Court's holding in *Wygant v. Jackson Board of Education,* 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) required Richmond to limit any race-based remedial efforts to eliminating the effects of its own discrimination, and Richmond's argument that the decision in *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) controls and gives Richmond the power to define and attack the effects of prior discrimination in its local industry.

Justice O'Connor distinguished the *Fullilove* decision from the facts surrounding the Richmond Plan. Justice O'Connor rejected Richmond's argument that its remedial powers were as

broad as those of Congress, stating that appellant ignored the fact that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. That power to "enforce" may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. *Croson,* 109 S.Ct. at 719.

In a section of Part II that is particularly relevant to the case before this court, Justice O'Connor further contrasted the broad remedial powers granted to Congress in this area from the rather narrow ones granted to the States and local governments:

> That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori,* the States and their political subdivision are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power, and the States must undertake any remedial efforts in accordance with that provision. To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivision. The mere recitation of a benign or compensatory purpose of the use of a racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial

> classification from judicial scrutiny under § 1. We believe that such a result would be contrary to the intentions of the Framers of the Fourteenth Amendment, who desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations.

Id.

However, Justice O'Connor also relied on the Court's decision in *Wygant* for the proposition that "a state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private discrimination within the constraints of § 1 of the Fourteenth Amendment. *Id.* 109 S.Ct. at 720. Thus, under Wygant, if Richmond could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, it could take affirmative steps to dismantle such a system. The Court stated that, as long as a public entity could identify the discrimination with the particularity required by the Fourteenth Amendment, it has a compelling interest in assuring that public dollars do not serve to finance the evil of private prejudice. *Id.*

In Part IIIA the Court observed that the Fourteenth Amendment provides that "[N]o State . . . shall deny to any person within its jurisdiction the equal protection of the laws," and found that the Richmond Plan denied certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race.

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According to Justice O'Connor, regardless of the racial group to which the effected persons belonged, any classification based on race must be subject to the test of strict scrutiny. The purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is proposing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. *Id.* at 721.

Croson reaffirmed the view expressed by the plurality of the Court in *Wygant* that the application of the strict scrutiny test is not dependent on the race of those burdened or benefitted by the classification. Justice O'Connor further justified the use of heightened scrutiny because of the concern that a political majority may act to the disadvantage of a minority, pointing out that 50% of the population of Richmond is black and five of nine city council seats are held by blacks.

Justice O'Connor compared the Court's decision in *University of California Regents v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), where the Court applied heightened scrutiny to a University of California racial quota that reserved 16 out of 100 seats in its entering class for certain minority groups. In *Bakke*, Justice Powell's plurality opinion rejected as the quota's justifications both a desire to have more black medical students and doctors and an effort to counter the effects of societal discrimination. *Id.* at 307, 98 S.Ct. at 2757. Justice Powell indicated that a government only has a compelling interest in favoring one race over another when there have been judicial, legislative or administrative findings of constitutional or statutory violations. Croson reaffirmed the position taken by

a plurality of the Court in *Bakke and* Wygant that the government's goal of remedying discrimination by imposing a racial classification must be focused on wrongs worked by specific instances of racial discrimination, *id.* at 308-09, 98 S.Ct. at 2757-58, rather than a more amorphous societal discrimination.

Part IIIA of the opinion discussed the inadequate justification for the race-based s stem of employee lay-offs ultimately invalidated by the Court in *Wygant.* The justification focused on the perceived need for role models to alleviate the effects of prior societal discrimination. The *Wygant* Court rejected the role model theory for two reasons: first, the statistical disparity between students and teachers was not probative of employment discrimination; and secondly, the theory had no relation to a satisfactory basis for believing discrimination had occurred and thus potentially could justify race-based decisionmaking "essentially limitless in scope." *Croson,* 109 S.Ct. at 723, *citing, Wygant,* 476 U.S. at 276, 106 S.Ct. at 1848.

In Part IIIB the Court applied the strict scrutiny standard to the Richmond Plan and found that evidence offered in support of it suffered from the same defects identified as fatal in *Wygant.* The city had argued that it was attempting to remedy various forms of past discrimination that were alleged to be responsible for the small number of minority businesses in the local contracting industry. *Croson,* 109 S.Ct. at 723. Justice O'Connor found that none of the findings relied upon by the district court, which upheld the Plan, established "a prima facie case of a constitutional or statutory violation by anyone in the Richmond construction industry." *Croson,* 109 S.Ct. at 724.

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The Court ruled that the following facts relied upon by the district court were an inadequate basis for the 30% quota and rejected them for the stated reasons: (1) The ordinance declares itself to be remedial. The Court said that the mere recitation of a "benign" or legitimate purpose for a racial classification is entitled to little or no weight. *Id.* at 724. (2) Several proponents of the measure stated their views that there had been past discrimination in the construction industry in this area, the State and around the nation. The Court found these statements to be "of little probative value in establishing identified discrimination in the Richmond construction industry. *Id.* (3) Minority businesses received .67% of prime contracts from the city while minorities constituted 50% of the city's population. The plurality found that reliance on this disparity was misplaced because where special qualifications are required to fill particular jobs, comparisons to the general population have little probative value. *Id.* at 725. (4) There were very few minority contractors in local and state contractors' associations. The Court stated that, standing alone, this fact is not probative of any discrimination in the local construction industry. *Id.* (5) In 1977, Congress made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally. *Id.* The plurality stated that this finding from *Fullilove* was of extremely limited probative value, reiterating the analysis from Part IIIA. The Court concluded that none of these findings, singly or together, provided Richmond with a "strong basis in evidence for its conclusion that remedial action was necessary." *Id., citing, Wygant,* 476 U.S. at 277, 106 S.Ct. at 1848.

Although Justice O'Connor stated that the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, she warned that "they must

identify that discrimination, public or private, with some specificity before they may use race-conscious relief." *Croson*, 109 S.Ct. at 727. Because the evidence offered by Richmond did not point to any identified discrimination in the local construction industry, the Court held that the city failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race.

Justice O'Connor stated that the above analysis applies only to the inclusion of blacks within the Richmond set-aside program. The Court easily struck down the set-aside with regard to Spanish-speaking, Oriental, Indian, Eskimo, or Aluet persons because the city presented no evidence of past discrimination against such persons.

In Part IV, Justice O'Connor stated that it was almost impossible to assess whether the Richmond Plan was narrowly tailored to remedy prior discrimination. First, the Court observed that it did not appear that Richmond gave any consideration to the use of race-neutral means to increase minority business participation in city contracting. The Court noted that many of the barriers to minority participation in the construction industry relied upon by the city appeared to be race neutral, and thus the city could have, for example, attempted a race-neutral program of city financing for small firms to help them meet bonding requirements.

Second, *Croson* found that the 30% quota did not seem to be narrowly tailored to any goal, except perhaps "outright racial balancing," and that the Plan appeared to rest on the unrealistic assumption that minorities will choose a particular trade "in lockstep proportion to their representation in the local population." *Id.* at 728. The Court stated, as further evidence

that the program was not narrowly tailored, that under the Richmond Plan a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. *Id.* at 729.

Part V of the opinion discussed the circumstances in which States and local governments may act to rectify the effects of identified discrimination within their jurisdiction. This advise was cogently capsulized in *The Cone Corporation v. Hillsborough County,* 723 F.Supp. 669 (M.D.Fla. 1989):

> (1) [W]here there is evidence of systematic exclusion of MBEs, the entity may take action to end the discriminatory exclusion. (2) [W]here there is significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors engaged by the locality or prime contractors, an inference of discriminatory exclusion could arise, and the entity could act to dismantle the closed business system by taking appropriate action against those who discriminate (in an "extreme" case, a narrowly tailored racial preference "might be necessary"). (3) [W]here there are individual instances of racially motivated refusal to employ minorities, an entity would be justified in penalizing the discriminator and providing appropriate relief" to the victim. (4) [If] supported by appropriate statistical proof,

> evidence of a pattern of individual discriminatory acts may lend support to a determination that broader remedial relief is justified . . . (5) [I]n the absence of evidence of discrimination, the entity may employ an "array of race-neutral devices" to increase accessibility to contracting by small entrepreneurs of all races including: simplification of bidding procedures; relaxation of bonding requirements; training and financial aid for disadvantaged entrepreneurs; and prohibition of discrimination in provision of credit or bonding by local suppliers and banks.

Id. at 683-84.

D. Merits of Plaintiffs' Claims

Plaintiff associations claim that the Philadelphia Ordinance is "essentially identical" to the Richmond Plan at issue in *Croson* and, like the Richmond Plan, fails to satisfy the strict scrutiny standard of equal protection review. This court agrees that the Ordinance must comply with the standard articulated in *Croson*. There is some suggestion in defendants' brief that the Ordinance should not be subject to the *Croson* analysis because the Ordinance classifies the preferred party based on socially or economically disadvantaged status, rather than racial or ethnic characteristics. In support of this position, defendant relies on a Western District of Wisconsin case in which the court provisionally held on a motion for a preliminary injunction that plaintiffs had a reasonable likelihood of success on their federal equal protection claim challenging a Wisconsin "Disadvantaged

Business Demonstration and Training Program." *See Milwaukee Co. Pavers,* 707 F.Supp. 1016, *modified,* 710 F.Supp. 1532 (W.D.Wisc.1989). In pertinent part, the Wisconsin statute provided that the state reserve four million in construction contracts for socially and economically disadvantaged businesses.[5] Under the language of the statute and the relevant provisions of the Code of Federal Regulations, a woman or minority group member is presumed socially and economically disadvantaged.

In *Milwaukee Co. Pavers,* Judge Crabb rejected defendants' argument that the Milwaukee statute should be taken out of the province of *Croson* because the statute did not classify on the basis of race [or gender]. The court's reasoning was that "neither the language of the relevant state and federal statutes and regulations nor the state's description of the operation of the program suggests that the classification of the challenged program are indeed based on the non-invidious and non-suspect classification of disadvantage." *Id.* at 1023-24. Judge Crabb reached this conclusion after finding that for all practical purposes, under the statute, all members of minority groups are irrebuttably presumed socially disadvantaged.[6] Although Judge Crabb did find that the presumption that a woman or a member of a minority group is economically disadvantaged "can be and

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5. The Wisconsin statute is similar to the Philadelphia DBE set-aside. It provides that to bid for the $4 million of contracts reserved for disadvantaged businesses, a firm must establish that it qualifies as a socially and economically disadvantaged business.

6. The court found that the only way a challenger might be able to rebut the presumption of social disadvantage is by demonstrating "that for all practical purposes the applicant is not a member of the minority group to which he or she claims to belong." *Id.* at 1026.

has been challenged successfully," *id.* at 1025, the court held that since race, national origin and gender are proxies for socially disadvantaged, the underlying classification is based on invidious categories. The court thus used the *Croson* standard to evaluate the plaintiffs' likelihood of success on the equal protection claim.[7]

Defendants' attempt to differentiate the Ordinance from the statute under attack in *Milwaukee Co. Pavers* must fail. Defendants argue that Wisconsin's statute uses racial, ethnic and gender characteristics to define socially and economically disadvantaged persons, whereas the Philadelphia ordinance defines preferred persons not in terms of ancestral or ethnic qualities, but by the disadvantaged status of its ownership and in terms of the size of its business. This court rejects defendants' claim that the Philadelphia Ordinance does not define preferred status based on race, ethnicity, gender or handicap.

First, according to the definition of "socially and economically disadvantaged individuals" in § 17-501(11), *see supra* pp. 1280-81, even if the court accepts the defendants' argument that the presumption that all minorities, women and handicapped are socially and economically disadvantaged is rebuttable, and thus that all minorities, women and handicapped are *not* entitled to preferred treatment, the fact remains that under the definition *only* minorities, women and handicapped can ever be granted preferred status. Thus, as the court reads the definition in § 17-501(11), a non-minority, non-female or non-handicapped business owner, who otherwise has been unable "to compete in the free enterprise system . . . due to diminished capital and

7. In its decision to apply the *Croson* standard to the Wisconsin "disadvantaged business statue," the court held that *Croson* is applicable to classifications based on gender, as well as race and ethnicity.

credit opportunities as compared to others in the same business area who are not socially disadvantaged" would not be entitled to preferred treatment. This indicates to the court that labelling the preferred class "socially and economically disadvantaged individuals" is simply an exercise in advancing form over substance.

Second, in support of its finding that the DBE preference is really a racial-, gender- and handicapped-based classification, the court points to the transcript of the hearing held Wednesday, April 29, 1987 on Bill No. 1260. As discussed *supra* pp. 1280-81, Bill No. 1260 incorporated the DBE concept utilized in federal set-asides in place of the existing independent set-asides of 15% for MBEs and 10% for FBEs. At the April 29, 1987 hearing, the city council ultimately rejected combining the separate MBE and FBE goals into one 25% set-aside. Instead, the city council maintained separate contracting goals for MBEs and FBES. *See* Transcript, April 29, 1987, at 553. Despite the label "disadvantaged business enterprise" given to the preferred class, the court has trouble agreeing that a program that sets aside 15% of city contracts for minority-owned businesses and 10% of its contracts for female-owned business does not define preferred status based on race or gender.

The court finds that the DBE concept is a cosmetic endeavor designed to camouflage a race-, ethnicity- and gender-based ordinance. Having decided to maintain the separate goals for MBEs and FBES, some of the councilmembers expressed concern about the potential irrelevance of the DBE concept. Stanford Hines responded that the purpose of the DBE classification was to prevent the "well-heeled minority business owner or a female who succeeded in ownership of a profitable business from her father or her husband or her uncle" from being

entitled to a preference under the set-aside program. *See id.* at 549. The court does not believe that this announced purpose serves to take the Ordinance out of the realm of racial- and gender-based classifications.

In addition, defendants argue that since § 17-501(10)(b) provides that businesses receiving more than five million dollars of contract work with the city are ineligible even if the owners are minority or females, the classification of economically disadvantaged is rebuttable. This argument does not rescue defendants' contention that the Ordinance does not classify on the basis of race or gender. Under the Ordinance such businesses are not "ineligible" for preferred treatment. Rather the MBEC "shall make a rebuttable presumption that the concern is not a disadvantaged business enterprise." § 17-501(10)(b). Thus, defendants' claim that this five million dollar threshold shows that the Ordinance, unlike the Milwaukee Statute, excludes those businesses whether or not minority-owned or female-owned that suffered no disadvantage, is unfounded. Furthermore, the fact that the classification of "economically disadvantaged" is rebuttable does not lead to a different result from *Milwaukee Co. Pavers.* There the court found that the statute defined the preferred class based on race, ethnicity or gender despite the fact that the presumption of economic disadvantage of those persons was found to be rebuttable. *See supra* p. 1293. In addition, the court questions whether setting the cut-off point at a total of five million dollars of previous awards of city contract work really creates a "rebuttable presumption." It seems to the court that the threshold is so high that requiring a challenger to make that showing is equivalent to mandating a showing that an applicant "is not a member of the minority group to which he or she claims to belong"—a showing so burdensome that the court

in *Milwaukee Co. Pavers* found the presumption to be irrebuttable. *Milwaukee Co. Pavers*, 707 F.Supp. at 1026.

For the above reasons, defendant has failed to persuade the court that its "Disadvantaged Business Enterprise" set-aside is not merely a race-, ethnicity- or gender-based classification by another name. Therefore, as in *Milwaukee Co. Pavers*, because this court finds that the preference in the Ordinance determines eligibility on the basis of invidious and suspect classifications of race and ethnicity,[8] the court will follow the standard articulated in *Croson* to analyze the constitutionality of the Philadelphia Ordinance. *See, e.g., United Fence and Guard Rail Corp. v. Mario M. Cuomo*, 878 F.2d 588 (2d Cir.1989); *Milwaukee Co. Pavers, supra.*

Because the court can dispose of all matters before it in an examination of plaintiffs' claim under 42 U.S.C. § 1983 that the Philadelphia Ordinance violated their rights under the Equal Protection Clause of the United States Constitution, the court will not address plaintiffs' claims under title 42 U.S.C. § 1981, article I, §§ 26 and 28 of the Pennsylvania Constitution, title 73 P.S. § 1622, and § 8-200 of the Philadelphia Home Rule Charter.

1. *Race and Ethnicity*

a. *Race*

As discussed above, *see supra* pp. 1289-90, the Supreme Court has made it clear that race-based set-aside programs must be evaluated under the strict scrutiny standard. The decision in *Croson* to subject racial classifications to the strict scrutiny

8. The applicability of the *Croson* analysis to the gender-based classifications in the Ordinance are dealt with in section 2, *infra.*

standard is not new. Previous cases have used this difficult standard to test the constitutionality of benign and invidious racial classifications. *See United States v. Carolene Products, Co.*, 304 U.S. 144, 152-53, n. 4, 58 S.Ct. 778, 783-84, n. 4, 82 L.Ed. 1234 (1938) (first suggests strict scrutiny of legislation affecting "discrete and insular" minorities); *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944) (first enunciates strict scrutiny standard for race-based classifications despite upholding World War II internment of Japanese-Americans); *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (applies strict scrutiny under Equal Protection Clause to reject "separate but equal" doctrine in public schools). However, the *Croson* decision does not focus on the choice of level of equal protection review. Instead, the plurality opinion is centered on a discussion of the difficult level of proof with which a government must comply to pass muster under the strict scrutiny test. The focus seems to be on the methodology and process a government must employ in enacting a set-aside provision. In particular the court emphasizes the precise nature of evidence that a government must consider. The court is equally clear about the type of evidence a government must avoid. Thus, in evaluating the constitutionality of the Philadelphia Ordinance, in addition to applying the strict scrutiny standard, this court must bear in mind what it believes to be the philosophy imbedded in the *Croson* opinion; the notion that a set-aside program will defeat an equal protection challenge only if there is specific evidence of systematic prior discrimination in the industry in question by that governmental unit.

To determine if the race-based classifications in the Ordinance comply with the *Croson* standard, the Court has examined over 800 pages of testimony documented in the

legislative record provided by the parties. Having done so, the court has concluded, for the following reasons, that the Ordinance suffers from the same defects as did the Richmond Plan in *Croson*.

The strict scrutiny standard requires that the goal of the classification be a compelling state interest and that the means chosen be narrowly tailored to effect that purpose. The first inquiry is thus whether the goal of the Philadelphia city council qualifies as a compelling state interest. Under *Croson*, the level of proof required of the city to demonstrate a compelling state interest is enormous. The city council appeared to have several "interests" in mind when enacting the Ordinance, each of which is laudable. The council sought, *inter alia*, to encourage minority participation in city contract awards; to provide equitable opportunities to participate in city contracts; to encourage full employment among citizens of Philadelphia; to remedy a pattern of past and present discrimination; and to encourage the growth of minority businesses. *See* Preamble, Bill No. 1260.

Although the court believes these goals to be commendable, the court cannot find that defendants have shown with particularity the specific instances of discrimination required by *Croson* to support a finding of a "compelling state interest." In other words, under *Croson*, it is not merely enough to espouse urgent goals and present them as objectives of the legislation. Rather, a local government seeking to enact a race-based set-aside program must rely on specific identified evidence of prior systematic discrimination by that government and then determine that the goal is "compelling" *solely* on the basis of that evidence. Here, the city council appears to have relied precisely on the type of evidence that led the Supreme Court to invalidate the Richmond Plan.

First, the Philadelphia Ordinance declared itself to be remedial. The preamble of Bill No. 1260 states that a purpose of the Ordinance is the eradication of present manifestations of discrimination in the procurement of city contracts. Other avowed goals are the establishment of economic parity between minority and majority businesses and the elimination of minority unemployment in Philadelphia. Congressman William H. Gray, III also testified that the Ordinance was "a proposal aimed at redressing the effects of years of racism and isolationism experienced by Philadelphia's minority business community, in their efforts to fully participate in the city's procurement and contracting activity." Transcript, Feb. 17, 1982, at 9. Although the *Croson* plurality stated that classifications based on race must be strictly reserved for remedial settings, the Court held that it is not sufficient for an ordinance to merely declare itself to be remedial, and that such recitation of benign or legitimate purposes should be accorded little weight. This court also points out that the stated goal of encouraging the development of MBEs is not permissible under *Croson*.[9]

Second, several witnesses testifying before the city council in support of the Ordinance presented conclusory views that there had been discrimination in the construction industry in the Philadelphia area, in the state and around the nation. Beverly Harper, President of the Brain Trust, a minority business action group, testified:

> [If] cities in every other part of this country can institute set-asides, then surely

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9. This is not to say that encouraging the development of new MBEs is not a worthwhile goal. The city may work to that end, but it must choose a neutral means to accomplish its objective.

> Philadelphia can too. . . . We don't really want to wait until this legislation goes through the political process. The situation is so dreadful that something can and should be done immediately.

Transcript, Feb. 17, 1982, at 90-91. Benjamin Brown, Executive Vice President of Systems Research Co. stated that "surely 40 percent of Philadelphia's population cannot be ignored economically as it has been from a procurement perspective for all these years." *Id.* at 113. Congressman Gray pointed to an "increased mood in Washington, D.C., states and local governments of indifference, antipathy and hostility toward societal and governmental initiatives aimed at redressing over 200 years of repression and racism in this country . . . that has relegated minorities motionless in their quest for social and economic parity." *Id.* at 232. He also described years of "insensitivity and injustice" toward minority businesses. *Id.* at 234. The city council relied on a study compiled by Mark Battle Associates that examines the set-aside process in general and has been used by "minority businesses nationwide . . . to support set-aside legislation and the continuation of minority business and economic development programming." *Id.* at 22. Congressman Gray discussed the existence of "societal" discrimination against minorities. *Id.* at 27. In *Croson*, the Court stated that similar evidence submitted as justification for the Richmond Plan was of little probative value in establishing identified discrimination in the Richmond construction industry. Accordingly, this court finds that such statements pervading the record cannot form the basis of a conclusion that the city council's interest was "compelling" within the meaning of the strict scrutiny test.

Because the record is replete with such testimony that cannot form the basis for a set-aside program, the court must reject defendants' argument that the record reflected sufficient evidence to sustain a finding that the need was compelling. However, the defendants are not incorrect in arguing that the city had before it some specific evidence of prior discrimination in the awarding of city contracts. Having examined the entire record, the court did find several portions of testimony documenting incidents where identified minority business owners felt they had been excluded from contracting opportunities on the basis of race. Some of this testimony appears to be precisely what the *Croson* Court required governments to consider in lawfully enacting a race-based set-aside program. *See* Testimony of Leonard Killebrew, Wayne Levy, Henry Settle and Kenneth Gordon Brinkley, *id.* at 119-22, 168-77, 207-09, 295-96. Although such evidence is pertinent and should be considered by the city council in the event it seeks to reenact the Ordinance in compliance with *Croson*, the court finds that it was other evidence of the type deemed impermissible by the Supreme Court that overwhelmingly formed the basis for the enactment of the Ordinance. The record contains so much unsupported general testimony about the problem of discrimination, *see supra* pp. 1295-96, as well as impermissible statistics and information on the national set-aside program, *see infra* pp. 1297-98, that the court finds it was most likely impossible and certainly unlikely that such forbidden evidence did not taint the minds of city councilmembers. In addition, *Croson* requires that the evidence of exclusion must be shown to be systematic, rather than sporadic or isolated events. *Croson*, 109 S.Ct. at 729.

Third, the city council relied on the disparity between the number of prime contracts awarded to minority firms and the

minority population of the city of Philadelphia. Congressman Gray stated:

> Out of some $975.6 million in City funded procurement over the past three years, minority Philadelphia firms who were available, and I would also add capable of doing the work, received a paltry $774,000 in contracts, or a dismal one-ninth of one percent . . . Now if minorities make up more than 40 percent of the total population, . . . a return to our community of only $774,000 in City funded contracts is not only fundamentally inequitable but also unacceptable.

Transcript, Feb. 17, 1982, at 14-15. In *Croson* the Court stated that in such a situation where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task, and thus, comparisons to the general population have little probative value. *Croson,* 109 S.Ct. at 725. Congressman Gray's statement makes such a comparison.

The *Croson* Court was particularly concerned with the fact that "the city [did] not even know how many MBEs in the relevant market are qualified to undertake prime or subcontracting work in public construction projects." *Id.* The following statement by Carl Singley, a drafter of Bill No. 343, indicates that the statistical evidence before the Philadelphia city council is flawed in much the same way as that rejected in *Croson:*

Appendix H

> [W]e felt at the time of the drafting that there was not sufficient data available to this Council that would indicate the number of minority businesses that currently exist in Philadelphia and within the surrounding area that would be capable of performing the contracts that the City lets on an annual basis. So the thought in this legislation would first be to . . . arrive at essentially ball park figures for percentage purposes, looking at what we felt was a rough approximation, given the absence of a formal survey of our inventory, of the number of businesses capable of performing in the four areas discussed in the ordinance.

Transcript, Feb. 17, 1982, at 42. In addition, like the Richmond city council, the Philadelphia city council failed to examine the level of minority participation in subcontracting, an analysis necessary to gain an accurate picture of minority representation in the city's construction expenditures. The city council clearly lacked sufficient information to enable it to use statistics to demonstrate discriminatory exclusion. *See Croson*, 109 S.Ct. at 725.

Finally, as demonstrated by the following two passages, the city council relied on Congress' finding in connection with the set-aside approved in *Fullilove* that there had been nationwide discrimination in the construction industry. Ernest Edwards, President of Uniland Corporation, a construction, development and property management company, testified as follows:

> The Federal Government uses a ten percent

> set-aside of work for minorities in the construction industry because we represent approximately ten percent of the national population. On that basis, with the minority community, blacks and hispanics, representing over 50 percent of the City of Philadelphia, we should be here seeking at least a 50 percent set-aside, rather than a 15 percent set-aside.

Transcript, Feb. 17, 1982, at 177-78. In addition, Congressman Parren J. Mitchell (D-MD) stated:

> . . . Some may argue that quotas are unconstitutional. The bill before you today does not set quotas. It does however establish goals. The US Supreme Court in the 1980 case of *Fullilove v. Klutznick* handed down a land-mark decision. The Justices held that Congress could mandate that a percentage of local public works contract dollars be set aside for minority business. This case resulted from an amendment I introduced in 1977 to the local public works act requiring the economic development administration to set-aside 10% of its local public works contracts for minority business. This case, I believe, will provide you with the legal support for Bill No. 343. Thus the issue before you today should not be a legal issue but one of policy.

Id. at 239. Such reliance on nationwide findings of

discrimination is of limited probative value. *Croson*, 109 S.Ct. at 726. As discussed above, the *Croson* court specifically held that Congress has unique powers under § 5 of the Fourteenth Amendment to make findings of discrimination to ensure that the expenditure of federal funds does not foster prior discrimination. The Supreme Court has made it clear that states and localities have less latitude in enacting race-conscious remedial relief. They may do so only after specific identification of discriminatory spending practices with specificity. Because *Croson* held that localities may not properly rely on Congressional findings of nationwide discrimination, this court must likewise reject such evidence presented to the Council of the City of Philadelphia.

In conclusion, the evidence before the city council did not enable it to demonstrate a compelling interest in keeping with the stringent standard of proof adopted in *Croson*. In fact, the record demonstrates that the Philadelphia Ordinance possesses four of the five characteristics fatal to the constitutionality of the Richmond Plan. The court finds that the city council failed to consider sufficient evidence of identified discrimination in the Philadelphia construction contract procurement process, and that the council was instead influenced by evidence that has been held to be an insufficient basis for race-based set-aside programs. *See Croson, supra.* Accordingly, the defendants fail to meet the first prong of the strict scrutiny test.

Although it is not necessary to analyze whether defendants have complied with the second prong of the test, the court will do so to provide guidance to the city should it seek to reenact the Ordinance.

To be upheld under the strict scrutiny test, not only must

the Ordinance be enacted pursuant to a compelling state interest, it must also be narrowly tailored to effect that interest. In concluding that the Richmond Plan was not narrowly tailored, the Supreme Court pointed to two unacceptable characteristics of the program that burden the Philadelphia Ordinance as well.

First, the *Croson* Court noted that the Richmond city council gave no apparent consideration to using race-neutral means to increase minority business participation in Richmond contracting. The same holds true for the Philadelphia Ordinance. There is no indication in the record that the city council considered any alternative to the race-based classification they adopted to solve the problem of low participation of MBEs in city contracting. A number of witnesses testified that nondiscriminatory factors prevented successful development and utilization of minority contractors.[10] Had the city investigated the alternatives targeted to overcome these non-racial factors and then found it necessary to reject them because they were not viable or practical, it would be more likely that the chosen means would be deemed narrowly tailored.

Second, the *Croson* court based its finding that the Richmond Plan failed to withstand strict scrutiny in part on its finding that the 30% quota was not narrowly tailored to any

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10. *E.g.*, Congressman Gray ("quite simply, high interest rates are literally killing off small and minority businesses at record rates"), Transcript, Feb. 17, 1982, at 11; Carl Singley, (lack of prior experience and other admittedly "race-neutral" qualifications), *id.* at 63; Ernest Edwards (corruption, collusion among larger firms, mismanagement by city officials and the absence of a fair and adequate system for bid notification), *id.* at 172-73; Ronald White (lack of bargaining power with manufacturers, which larger contractors possess), *id.* at 201; Leroy Quarles (lack of manufacturing capacity), *id.* at 214-15.

goal, except outright racial balancing. Although the Philadelphia Ordinance's 15% set-aside does not appear to be an attempt to achieve "outright racial balancing," the record does not indicate that it is tied to any legitimate goal whatsoever. The *Croson* Court believed that in choosing a percentage quota, the city must only provide remedial relief to those who have been shown to have suffered the effects of previous discrimination. *Croson*, 109 S.Ct. at 729, Councilwoman Specter herself admitted that the choice of the 15% set-aside was arbitrary. *See infra* pp. 1306, 1309. One of the drafters of the Ordinance freely stated that the city did not even know the number of capable MBEs existing in the Philadelphia area at the time the Ordinance was enacted. *See supra* p. 1297. At one point, the city council even considered merging the 15% goal for MBEs and the 10% goal for FBEs into one 25% set-aside. The city's decision to maintain the separate goals was not motivated by any specific information on what precise breakdown would be justified or realistic; rather the decision was essentially a political decision motivated by pressure from some councilmembers to maintain a distinct, albeit arbitrary, goal for FBEs. *See* Transcript, April 29, 1987, at 532-34. Moreover, the existence of a case-by-case waiver system in which a business may, under certain circumstances, be excused from complying with the set-aside, does not render the chosen percentage narrowly tailored.

In addition, there was a great deal of testimony about the problem of fraudulent or "front" MBEs established to enable non-MBEs to reap the benefits of the 15% set-aside. The development of these front MBEs is apparently encouraged by the inability of legitimate MBEs to reach the goals set by the Ordinance. *See id.* at 581. The fact that there exists a gap between the amount of the set-aside and the number of capable MBEs such that non-MBEs are developing front businesses to

be eligible for preferred status, is a clear indication that the city did not adequately determine a narrowly tailored solution to the perceived problem of discrimination in the city procurement process.

The court does note that, unlike the Supreme Court's finding with regard to the Richmond Plan, the Philadelphia city council attempted to tailor its remedy in one respect. Under the Richmond Plan, a successful black entrepreneur from anywhere in the country enjoyed an absolute preference over other citizens based solely on their race. The Philadelphia city council defined DBEs to provide that MBEs that have received more than five million dollars in city contracts are automatically excluded from the set-aside. Although this is certainly a valid attempt to prevent some MBEs that do not need the benefit of the set-aside from participation, it by no means ensures that all "well-heeled" MBEs will be exempt. The record gave no indication of the genesis of the five million dollar figure, or whether that number was itself tailored to achieving the desired goal. Thus, the existence of the five million dollar cut-off does not convince the court that the arbitrary choice of a 15% set-aside is narrowly tailored. Accordingly, the Ordinance fails both prongs of the strict scrutiny test.

b. *Ethnicity*

In addition to Blacks, the Ordinance also includes Hispanics, Asian Americans, American Indians and Alaskan Natives in its definition of "minority persons," and thus contains classifications based on ethnicity. The strict scrutiny standard applicable to race-based classifications is also used to evaluate ethnicity-based classifications. *Croson,* 109 S.Ct. at 727-28. Whatever the ambiguities of the *Croson* opinion and the various

concurrences, it is clear that a majority of the Court believes that state laws employing racial and ethnic classifications must be supported by specific evidence of discrimination in the state against those aided by the statute and be narrowly tailored to remedy those past wrongs. *Milwaukee Co. Pavers,* 707 F.Supp. 1016, 1028 (W.D.Wisc.1989), *citing, Croson,* 109 S.Ct. at 723-29.

Employing this standard, the *Croson* court struck down the Richmond set-aside as applied to Spanish-speaking, Oriental, Indian, Eskimo or Aleut persons. As in *Croson,* there is no evidence whatsoever in the legislative history of the Philadelphia Ordinance that an American Indian, Eskimo, Aleut or Native Hawaiian as ever been discriminated against in the procurement of city contracts. Nor is there any evidence that any such individuals even own businesses in Philadelphia. This random inclusion of ethnic groups in the preferred class without any evidence of discrimination against these groups militates strongly against a finding that the classifications are remedial. Thus, the court finds that the ethnicity-based classifications fail to withstand strict scrutiny in violation of the Equal Protection Clause.

2. *Gender*

The Philadelphia Ordinance includes not only race- and ethnicity-based classifications, but gender based classifications as well. The *Croson* court did not address the question of what standard should be applied to assess the validity of classifications based on gender in the affirmative action context.

Prior to *Croson,* this Circuit consistently held that the appropriate standard of review to be applied by the courts in

equal protection analysis is determined by reference to the nature of the right affected by the classification and the identity of the class burdened. *Medora v. Calutti*, 602 F.2d 1149, 1154 (3d Cir.1979). In addition, also prior to *Croson*, strict scrutiny, the highest level of scrutiny, was always reserved for classifications based on race, national origin or ethnicity, and never applied to classifications based on sex. *Main Line Paving, supra*, at 1356.

The *Croson* opinion gives no indication that the strict scrutiny analysis applied to remedial race- and ethnicity-based classifications was intended to be applied to other remedial forms of classification. The search for the appropriate standard to be applied to gender-based classifications must reach to cases preceding *Croson*. A long line of prior Supreme Court cases has varied the equal protection analysis applied to different classifications. *See Wygant, supra* (where the court applied strict scrutiny analysis to race-based and ethicity-based classifications); *Reed v. Reed*, 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225 (where the Court applied intermediate scrutiny to gender-based classifications); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S. Ct. 3249, 87 L.Ed.2d 313 (1985) (where the Court applied a rational basis test to classification of mentally retarded individuals).

In evaluating gender-based classifications that operate to disadvantage women the Court has used a standard of review less difficult than the strict scrutiny test employed to analyze race-based and ethnicity-based classifications [hereinafter "intermediate scrutiny"]. This analysis requires the state to demonstrate an important governmental interest and a means that bears a fair and substantial relation to achieving that objective. *Craig v. Boren*, 429 U.S. 190, 211, 97 S. Ct. 451, 464, 50 L.Ed.2d 397 (Powell, J., concurring). The Court has

also expressed the test as requiring an "exceedingly persuasive justification" for classifications based on gender. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724, 102 S.Ct. 3331, 3336, 73 L.Ed.2d 1090 (1982). The gender-based classifications at issue in the Philadelphia Ordinance serve to disadvantage men, thus put the question of the appropriate standard in a different light.

However, in the affirmative action setting the Supreme Court has also evaluated gender-based classifications that disadvantage men under intermediate scrutiny. In *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1978) the Court examined the constitutionality of Alabama alimony statutes providing that husbands, but not wives, may be required to pay alimony upon divorce. The Court expressed its view that even gender-based classifications designed to benefit women by compensating them for the effects of prior discrimination must withstand intermediate scrutiny. *Id.* at 283, 99 S.Ct. at 1114. *See also Caban v. Mohammed*, 441 U.S. 380, 394, 99 S.Ct. 1760, 1769, 60 L.Ed.2d 297 (1979) (Court used intermediate scrutiny to evaluate a New York domestic relations law permitting an unwed mother, but not an unwed father, to block the adoption of their child simply by withholding her consent). The Court inquired whether the gender classifications served "important governmental objectives" and were "substantially related to the achievement of those objectives." *Id.* at 279, 99 S. Ct. at 1111. The Court held that the statute was unconstitutional after determining that it failed the latter prong of the intermediate scrutiny test.

In another case, somewhat more analogous to the FBE set-aside before this court, the Supreme Court struck down the policy of a state-supported university that denied otherwise qualified

males the right to enroll for credit in its School of Nursing. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 102 S. Ct. 3331, 73 L.Ed.2d 1090 (1981). In evaluating the state's "educational affirmative action" program, the Court acknowledged that in limited circumstances a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionally burdened. *Id.* at 728, 102 S.Ct. at 3338. The state must show that members of the gender benefitted by the classification actually suffer a disadvantage related to the classification. The Court reiterated that the mere assertion of a compensatory purpose will not automatically shield the classification from scrutiny; rather, the scheme must withstand intermediate scrutiny. This intermediate scrutiny will serve to weed out those classifications with objectives that themselves reflect archaic and stereotypical notions. *Id.* at 725, 102 S.Ct. at 3336. Engaging in intermediate scrutiny, the Court concluded that the state had failed to establish the "exceedingly persuasive justification" needed to sustain the classification. *Id.* at 731, 102 S.Ct. at 3340. *Compare Califano v. Webster*, 430 U.S. 313, 97 S.Ct. 1192, 51 L.Ed.2d 360 (1977) (where the Court upheld against intermediate scrutiny analysis a statutory classification allowing women to eliminate more low-earning years than men for purposes of computing Social Security benefits, finding that the scheme took into account that women "as such have been unfairly hindered from earning as much as men" and "work[ed] directly to remedy" the resulting economic disparity).

Since the *Croson* decision, a few courts faced with a challenge to an affirmative action program for female-owned businesses have inquired into the appropriate standard of review. In *Main Line Paving Co., Inc. v. Board of Education*, 725 F.Supp. 1349 (E.D.Pa.1989). Judge Weiner ruled that the appropriate

standard for evaluating gender-based classifications instituted by the Philadelphia School Board is the intermediate scrutiny analysis announced by the United States Supreme Court in *Reed v. Reed, supra* and *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). Judge Weiner relied on the fact that the Supreme Court has consistently applied intermediate scrutiny to classifications based on gender and his belief that *Croson* did not alter this analysis.

The *Main Line Paving* opinion also relied on a pre-*Croson* Ninth Circuit decision applying intermediate scrutiny to a remedial gender-based classification. *Associated General Contractors of California v. City and County of San Francisco*, 813 F.2d 922 (9th Cir.1987). The Ninth Circuit held that classifications based on gender require an "exceedingly persuasive justification" because "a thin line divides governmental actions that help correct the effect of invidious discrimination from those that reinforce the harmful notion that women need help because they can't make it on their own." *Id.* at 939. The court found that helping women overcome the adverse effects of discrimination was a sufficiently important objective to justify the limited use of a gender-based remedial classification. However, the court determined that the scope of the remedy was over-broad and that the defendant had not demonstrated that women were disadvantaged in each of the industries covered by the ordinance. *Id.* at 941.

In another pre-*Croson* decision, the Sixth Circuit applied the intermediate scrutiny standard to a Michigan law creating a preference for female-owned business enterprises, and held that the preferences "cannot withstand constitutional attack since evidence of record that the State discriminate against women [was] non-existent." *Michigan Road Builders Ass'n, Inc. v.*

Milliken, 834 F.2d 583 (6th Cir.1987). The court found that defendants' reliance upon general assertions of societal discrimination were insufficient to satisfy their burden absent some indication that the "members of the gender benefitted by the classification actually suffer[ed] a disadvantage related to the classification." *Id., citing, Mississippi Univ. for Women*, 458 U.S. at 728, 102 S.Ct. at 3338. In addition, the court found that defendants presented no evidence that FBEs suffered a disadvantage in competing for state contracts, and accordingly struck down the ordinance.

Having examined the pre-*Croson* cases where the Supreme Court analyzed the constitutionality of statutes or policies disadvantaging men and found that in each of these cases the Court subjects the classifications to intermediate scrutiny, this court will examine the FBE set-aside in the Philadelphia Ordinance under that standard. The *Croson* opinion does not state that the strict scrutiny test applied to race- and ethnicity-based classifications should be used to analyze gender-based set-asides as well. In fact, when the *Michigan Road Builders* case was before the Supreme Court, the Court affirmed the opinion in light of its decision in *Croson*. The Court thus apparently believes that the *Croson* decision does not alter the application of intermediate scrutiny to gender-based classifications. Finally, the three post-*Croson* cases that use strict scrutiny to evaluate gender-based set-asides do not persuade this court that the decision to engage in intermediate scrutiny is incorrect. *See Conlon v. Blanchard*, 890 F.2d 811 (6th Cir.1989); *The Cone Corporation v. Hillsborough County*, 723 F.Supp. 669 (M.D.Fla. 1989); *American Subcontractors Ass'n v. The City of Atlanta*, 259 Ga. 14, 376 S.E.2d 662 (1989). In none of these cases does the court acknowledge that its decision to apply strict scrutiny to gender-based classifications is a departure from prior

Supreme Court cases. Nor do the cases provide support for the decision to do so. Instead, they cite *Croson* for the proposition that strict scrutiny is appropriate, but fail to identify where in the opinion that support can be found. The court thus finds these cases unpersuasive.

The decision to apply intermediate scrutiny to the FBE set-aside in the Ordinance is not without its problems. First, this court embraces the concern Justice Stevens expresses in his concurring opinion in *Croson. Croson,* like this case, involves an attempt by a legislative body—rather than a court—to construct a remedy for a past wrong. Justice Stevens points out that the province of a legislative body is the promulgation of rules to govern *future* conduct, and therefore takes issue with "the use of the political process to punish or characterize past conduct of private citizens." *Croson,* 109 S.Ct. at 731 (Stevens, J., concurring). Instead, Justice Steven opines that "it is the judicial system rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed." *Id.* at 731-32. Justice Stevens expressed this opinion in the context of the *Croson* decision that subjected the remedy at issue to strict scrutiny. Surely, this concern with the legislature's exercise of remedial powers is even more pronounced where the level of review of that power is the lesser standard of intermediate scrutiny.

Second, the use of intermediate scrutiny to analyze gender-based classifications in the affirmative action context produces an anomalous result. In the non-affirmative action context the use of a three-tiered analysis for ordinances disadvantaging blacks, women or non-suspect classifications creates the result intended by the Supreme Court—it is most difficult to uphold a

classification disadvantaging blacks, less difficult to uphold a classification disadvantaging women, and easiest to uphold a classification disadvantaging a non-suspect class. However, in the affirmative action setting the use of this three-tiered scheme means that laws disadvantaging whites (MBEs) will be held to a stricter standard than laws disadvantaging men (FBEs). The flip-side of this is that under the sliding scale analysis, it becomes easier for a state legislature or a city council to pass an FBE than an MBE, because the former will be held to a lesser standard of scrutiny by the courts.

This court questions whether this result was intended The anomaly lies in the fact that the three-tiered scheme sprung from the judicial determination that, as a class, blacks have been subjected to the most egregious discrimination over time. *See, e.g., Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). This determination is reflected in the choice of higher percentages for minorities in the Philadelphia Ordinance and other similar set-aside programs. The very existence of the Thirteenth and Fifteenth Amendments to the United States Constitution evinces a Congressional intent to give itself the power to redress past discrimination against blacks.[11]

However, a look at the Supreme Court decisions holding that laws disadvantaging blacks *and whites* should be held to the same strict standard, *see Croson, supra,* and that laws disadvantaging women *and men* should be held to the same

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11. In *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1873), the Supreme Court discusses the purpose of the Reconstruction Amendments: "The freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."

intermediate standard, *see Craig v. Boren, supra,* may explain or justify this anomalous result. Perhaps by determining that discrimination against whites and discrimination against blacks is equally abhorrent and that the criteria c. race is "more suspect" than gender discrimination, the Supreme Court has accepted the result that it is now more difficult to remedy race discrimination than sex discrimination. Whether it has or not, this court questions the logic of such a result.

Third, the *Croson* decision sent a powerful message that affirmative action and quotas are highly suspect. Although *Croson* plainly did not express its views on gender-based classifications, many of the Court's concerns are equally applicable to gender-based affirmative action programs. It may be that the logical extension of that case would be to view gender-based set-asides with the same critical eye as race-based set-asides.

Fourth, the application of the three-tiered framework—and intermediate scrutiny in particular—itself presents a problem. As the court stated in *Associated General Contractors, supra,* intermediate review provides "relatively little guidance in individual cases," *id.* at 939, *quoting*, Note, *Madisonian Interpretation of the Equal Protection Doctrine,* 91 Yale L.J. 1403, 1412 (1982). The continuum provides the court with "buzz words" (*i.e.* "compelling state interest," "important governmental interest" and "rational basis") that in practice are at times both difficult to distinguish and to apply. The three-tiered scheme, or "continuum" sometimes forces courts to make defined formulas fit ill-defined circumstances, possibly leading to result oriented decision-making.

Moreover, it is not so clear to this court that the Equal

Protection Clause mandates this scheme. Justice Stevens raised this point in his concurrence in *Craig v. Boren:*

> There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases.

429 U.S. at 211-12, 97 S.Ct. at 464 (Stevens, J., concurring). Justice Stevens believes that at least strict scrutiny and intermediate scrutiny really amount to the application of a single standard. *Id.* In *Cleburne*, where the Court articulated yet a third standard of review—the rational basis test—he suggests that the lowest test alone could effectively weed out classifications violating the Equal Protection Clause without resort to either of the two heightened scrutiny tests. *Cleburne*, 473 U.S. at 452-53, 105 S.Ct. 3260-61 (Stevens, J., concurring).

The case before this court highlights the problem of the merging of three tests into one standard that Justice Stevens expressed in his concurring opinion in *Cleburne*. As will be discussed below, *see infra* p. 1304, the *Croson* decision voiced the opinion of the court that specific evidence is required to enact remedial set-asides. Although in *Croson* this requirement was expressed as the "compelling state interest" prong of the strict scrutiny standard used to evaluate an MBE, this court feels the specific evidence requirement cannot be ignored even in the evaluation of an FBE or HBE. As may become apparent, the result of bearing in mind the need for specific evidence while conducting examinations of the FBE under the intermediate test and the HBE under the rational basis test, is that the analysis begins to take on the appearance of strict scrutiny.

Despite these considerations, the court will examine the FBE at issue in this Ordinance under the intermediate scrutiny standard.

To apply the intermediate scrutiny test to the case at hand, the court must engage in a two part analysis. First, the court must determine the city council's objective, and decide whether it constitutes an "important governmental interest," as opposed to the "compelling state interest" applied to race and ethnicity-based classifications.

The admonition in *Croson* that a city must produce specific identifiable evidence of discrimination against blacks by the city in the procurement process to defeat an equal protection challenge was made applicable only to race-based classifications in that case. Having determined the level of scrutiny to be "intermediate level," the question of whether a government defending a challenge of unconstitutional *gender* discrimination must also meet this rigorous evidentiary requirement appears to be one of first impression. This court believes that the philosophy embraced by the *Croson* court strongly suggests that the Supreme Court's view is that *any* remedial classification, not simply race- or ethnicity-based, must be tied to specific discrimination by the acting governmental entity. This court finds that this evidentiary burden will be greater or lesser depending on the level of scrutiny applied to the given classification. The question then becomes what type of evidence is sufficient to establish an "important governmental interest," as opposed to a "compelling state interest?" Of course, to satisfy the "important governmental interest" test, the amount of specific evidence considered by the city may be lesser than that required by *Croson* for race-based classifications.

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The *Croson* court made it clear that suppositions, suggestions or statements that discrimination exists alone cannot justify remedial legislation. Instead, such discrimination must be documented for the record and actually considered by the acting legislative body. Support for the application of this evidentiary requirement to gender-based classifications can be found in the pre-*Croson* decision of *Michigan Road Builders, supra*, where the Sixth Circuit struck down a FBE preference because the state failed to present evidence, other than general assertions, that the state discriminated against women in contract procurement, 834 F.2d at 595.

The city's "governmental interest" appears to be the eradication of present manifestations of sex discrimination in city contracting. *See* Preamble, Chapter 17-500. Having examined the entire legislative history before it, the court finds that the record is devoid of specific evidence that the city discriminated against women in its procurement process. Thus, the city has failed to point to a fact supporting an important governmental interest in creating a gender-based preference in its procurement process. In so stating, the court is not saying discrimination in the letting of city contracts does not exist. Nor is the court saying that the dismantling of a discriminatory system is not an important city goal. Rather, the court finds that if such gender discrimination does in fact exist in the letting of city contracts, for the city to remedy that discrimination by developing preferences for FBEs, it must produce and consider evidence of that discrimination in the development of such a remedial program.

It appears from the record that the predominant reason for the inclusion of FBEs in the Philadelphia set-aside ordinance was political compromise. Most of testimony on the FBE

preference focused on the effect of such a program on the city's efforts in the area of MBE set-asides. At the February 17, 1982 hearing councilmembers discussed whether women should be included in the Ordinance. There was no specific factual evidence that women have been discriminated against in the procurement and contracting industry in Philadelphia.[12] One witness, Rotan Lee, special counsel to Congressman Parren Mitchell, in discussing the question of whether including women among the preferred classes would serve to dilute the strength of the bill with regard to minorities, stated: "... if [the Ordinance] had to include women as opposed to not existing as law, then we should include women." Transcript, Feb. 17, 1982, at 37.

The testimony of Beverly Harper on March 23, 1982, indicated that the addition of a FBE set-aside was principally to increase political support for an affirmative action program in the letting of city contracts:

> I felt that it would broaden our base of support in the community to include women in this legislation. We had an opinion from our lawyers who have worked out of Washington and with other cities in drafting

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12. Congressman William Gray did state that women have been the victims of sexism in our society. Transcript, Feb. 17, 1982, at 27. Such a statement, and others like it, do not provide the court with specific instances of discrimination necessary to establish an important governmental interest in gender-based classifications. Beverly Harper, President of Brain Trust, a minority business action group, testified that she "know[s] specifically that women are discriminated against in City and other kinds of contracting as much as minority businesses are," but gave no evidence of this discrimination. Transcript, March 23, 1982, at 358.

> their legislation, and they felt that the fact that we included women added a lot of strength to our piece of legislation that does not exist in several other cities.

Transcript, March 23, 1982, at 358. Councilwoman Specter expressed a similar theme when she stated that even though statistically women businesses are succeeding more than other businesses, if there is no percentage set-aside in the ordinance for women, she warned that "we're going to have a problem." *Id.* at 533.

In addition, the city council relied on statistics indicating that despite the existence of 4,365 women business owners in Philadelphia, less than one half of one percent of all city contracts go to women business owners. The court finds that just as the *Croson* court ruled that similar statistics alone do not prove widespread historical discrimination against minorities, scattershot numbers are not a substitute for evidence of discrimination against women in the procurement of contracts in Philadelphia sufficient to establish an "important governmental interest."

Other than the generalized statements that women have been discriminated against in the letting of city contracts, *see supra* n. 12, the city had before it no actual evidence that this discrimination exists. Although to meet the "important governmental interest" prong of the test the city need not have before it the glaring evidence necessary to satisfy the compelling state interest test with regard to race-based classifications, the city must at least have some evidence, other than hearsay statements and hopeful declarations, that women have been discriminated against in Philadelphia's procurement process.

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Had the city council heeded the advice of Carl Singley, Professor of Law at Temple University, *see* Transcript, Feb. 17, 1982, at 44, and sought legislative findings to indicate the extent to which women have been discriminated against, the FBE set-aside may have withstood constitutional scrutiny. However, because the record is devoid of such evidence, the court finds that defendants have not shown the "exceedingly persuasive justification" required by the Supreme Court to sustain the gender-based classification contained in the FBE preference. *See supra* p. 1300.

Since the court finds that the city has not demonstrated an important governmental interest it is not necessary to address the second portion of the test. However, as before, the court will discuss the second portion for purpose of guidance in the event the city seeks to reconsider its Ordinance.

The second prong of the intermediate scrutiny test requires the court to determine if the city has shown that the chosen means are substantially related to the important governmental interest. The court must thus decide whether if the city had demonstrated an important governmental interest in establishing a FBE preference, the 10% set-aside would be "substantially related to that goal." Despite the fact that this standard is somewhat less stringent than the "narrowly tailored" requirement discussed above, *see supra* pp. 1298-99, the court finds that defendants have failed to relate the 10 percent figure to the problem it seeks to remedy.

First, the city council did not know the true number of FBEs in the Philadelphia area. During the March 23, 1982 hearing, Priscilla Chialiastri, owner of a catering business and Chairperson of the Task Force of Women-Owned Business

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Enterprises of the Mayor's Commission for Women, acknowledged that the survey used to acquire the numbers presented to the city council was conducted in a disorganized and unsystematic fashion. Ms. Chialiastri conceded that the task force determined the number of FBEs by "ask[ing] everybody we knew to turn in the name of a woman business owner to us on an individual basis." Transcript, March 23, 1982, at 350. She also confessed that she did not know if the task force statistics were a hundred percent accurate because they have not all been documented. *Id.* at 351.

Second, there was considerable evidence before the city council that the 10 percent figure was arrived at through political compromise, rather than by an effort to relate the remedy to the wrong. The testimony of Beverly Harper is particularly illustrative:

> We felt that we could—it would be more difficult to demonstrate that women-owned businesses could in fact perform ten percent of the City—more than ten percent of the city contracts. The goals were a compromise. There were a number of people in the Brain Trust who wanted the goals to be much higher. We went through several meetings where we discussed the goals, and I felt that we should go in, a number of people felt that we should go in for higher goals and negotiate down. I felt strongly that we should to in with goals that we thought we could achieve, we could perform and we could sell, and hang tough right there and not even talk about compromise. *Id.* at 360.

Third, when the city council held hearings in 1987 on the amendments establishing a DBE program, there was testimony that since the FBE set-aside was enacted in 1982 there were not enough FBEs to even take up the ten percent of overall city contracting. *See* Testimony of Stanford Hines, Transcript, April 29, 1987, at 529. Councilman Street agreed, stating, "We all know they [FBEs] won't reach the goal. We know they won't reach the goals." *Id.* at 581. In addition, Councilman Street acknowledged that because the FBE percentage was set too high, the Ordinance was promoting wide-spread fraud, stating, "We know there are a lot of women who are coming in who we believe are setup by other people to come and to get this share of the contract . . ." *Id.*

Finally, during the September, 1988 hearing on Bill No. 108, Councilwoman Specter acknowledged that there was absolutely no attempt on the part of the city council to arrive at a percentage set-aside that was in any way tied to the gender discrimination they were attempting to remedy. She stated:

> We didn't do a study to see whether or not ten percent was proper for women or the percentage for minorities was correct. We know there were a lot of women out there . . . and they weren't getting their share. And we set a goal. And it was pretty arbitrary. And we sought to encourage. And that's what this does. Transcript, Sept. 27, 1988, at 751.

In addition, the above statement indicates that one goal of the city council was to use the ten percent set-aside to encourage the growth of new FBEs. *See* Testimony of Stanford Hines, Transcript, April 29, 1987, at 533 ("[w]e can hope that women

will be more active in creating businesses. And I think *eventually* women will meet the goals that are set . . .") (emphasis added); *see also* Preamble, Chapter 17-500. This court believes that the *Croson* decision stands for the notion that set-asides cannot constitutionally be used to encourage the development of new businesses, but rather must be strictly remedial. This court agrees that a set-aside goal established to encourage new FBEs is inconsistent with the requirement that such a goal be substantially related to the goal of remedying gender discrimination. Accordingly, the defendants fail to meet this prong of the intermediate scrutiny test and the FBE set-aside thus violates the Equal Protection clause of the Fourteenth Amendment of the United States Constitution.

3. *Handicap*

In addition to creating preferences for minority- and female-owned businesses in the letting of city contracts, the Ordinance also includes a 2% set-aside for handicapped business-owners.

Similar to the above analysis with regard to gender-based discrimination, this court believes that the appropriate test to determine the constitutionality of a set-aside for handicapped individuals can be determined from prior Supreme Court cases concerned with benign or invidious discrimination against such individuals.

The Supreme Court has not clearly defined the level of scrutiny to be applied to classifications based upon disability. However, in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1984) the Court did examine the constitutionality of an ordinance that required special use permits for "hospitals for the feebleminded" and of

the city council's denial of such a permit to a group home for the mentally retarded. A majority of the Court in *Cleburne* overturned a Fifth Circuit decision holding that the mentally retarded form a quasi-suspect class entitled to intermediate level or heightened scrutiny. Instead, the Court ruled that legislation that distinguishes between the mentally retarded and others "must be rationally related to a legitimate governmental purpose." Applying this "rational basis test" the Court ruled that the city council deprived the Cleburne Living Center of the equal protection of the laws because the council lacked a rational basis for denying the special permit.[13]

Plaintiffs contend that this court should apply the rational basis test employed in *Cleburne* to evaluate the classification based on handicap in the Philadelphia Ordinance. Plaintiffs argue that the *Cleburne* Court suggested this result in *dictum*. In concluding that the Court of Appeals erred in holding mental retardation a quasi-suspect classification, the Supreme Court stated:

> . . . if the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting

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13. Accordingly, the Court did not address whether the special use permit provision was facially invalid where the mentally retarded are concerned. Because the court chose only to inquire into the constitutionality of the law as applied, the *Cleburne* decision provides little guidance as to how employ the rational basis standard or whether and how to differentiate between different retarded individuals. *Cleburne*, 473 U.S. at 478, 105 S.Ct. at 3274 (Marshall, J., concurring).

> them off from others who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.

Id. at 445-46, 105 S.Ct. at 3257. Although the Court did not address the issue of the appropriate standard applicable to classifications based on the status of "disabled," this court agrees with plaintiffs that the above language suggests that the decision to use the rational basis test with regard to classifications based upon mental retardation would also apply to classifications based on handicap. Accordingly, this court will examine the two percent set-aside for handicapped individuals under the "rational basis standard."

To be upheld under the rational basis test, the two percent set aside legislation must be "rationally related to a legitimate governmental purpose." *Id.* at 446, 105 S.Ct. at 3258. The rational basis test is the least strict of the three standards by which courts evaluate equal protection challenges. Although this test is intended to give states wide latitude, the court finds that, as with gender-based classifications, the HBE set-aside must also comply with the evidentiary requirements.

Under the rational basis test, the first inquiry is whether the objective of the city council was legitimate. This court has no trouble concluding that the avowed purpose of the two percent set-aside is legitimate. The announced goal of the Ordinance is to encourage handicapped persons to develop business and

participate in the free enterprise system by eliminating barriers to employment, business opportunities, education, and professional advancement of disabled persons. *See* Preamble, Bill No. 108. There was also some discussion at the September 27, 1988 hearing on Bill No. 108 suggesting that another purpose of the set-aside was to remedy prior discrimination. *See* Testimony of Ted Young, Transcript, Sept. 27, 1988, at 725-29. The council heard from several witnesses who testified generally about discrimination against the handicapped in education, employment and professional advancement. *See id.* at 725-47. The court believes that encouraging the development of businesses owned by persons previously excluded from the marketplace, for whatever reason, is an admirable goal for government to pursue

Thus, the two percent set-aside for handicapped individuals meets the first prong of the rational basis test. To meet the second prong of the test, the set-aside must be rationally related to this goal of encouraging the development of handicapped business. This court believes that under *Croson*, the set-aside for HBEs must be supported by some evidence that there was prior discrimination against handicapped businesses in the procurement of city contracts." [14]

In contrast with the testimony offered in support of the FBE set-aside, the evidence presented at the hearing on Bill No. 108 did contain specific instances of discrimination against handicapped individuals.[15] However, to both meet the rational

14. Of course, the evidence need not be as compelling as required for race-based or gender-based classifications.

15. Ted Young, representing the Greater Philadelphia Chapter of the National Federation of the Blind documented several cases of discrimination against blind employees of the City of Philadelphia. These individuals were (Cont'd)

basis test and to satisfy the evidentiary standard required by *Croson*, the city council should have considered evidence of past discrimination against handicapped business enterprises, and not merely discrimination against individuals. The absence of this type of evidence suggests to the court that there was no rational relationship between the city's goal and the creation of a two percent set-aside for HBEs.

Two additional factors lead this court to conclude that the two percent set-aside is not rationally based on the city's stated purpose. First, witnesses and councilmembers present at the hearing on Bill No. 108 acknowledged that no studies were undertaken to determine whether HBEs have in fact been discriminated against in the procurement of city contracts. When Councilman Cohen inquired as to whether "there are any handicapped that [sic] believed they have been denied the benefits of what Bill 108 would give," Ted Young replied that the National Federation of the Blind has not done research on this. In addition, Councilwoman Specter made the following statement:

> . . . it is true that there have been no studies done and, as Mr. Young pointed out, studies are good business for some people. We have not made a study in this case. And that's why

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(Cont'd)

not, however, involved in the procurement of city contracts. For example, Mr. Young reported that there was a legally blind person working for the city recreation department. This individual came up through the ranks and had attained a second supervisory level. At some point, someone read in the employee's personnel record that he had a vision problem. The employee was then fired. After reviewing the case, the mayor refused to reverse the decision.

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> I asked the question of the people who came here to testify, because they are working in the field . . . to get a sense from them as to how many people they feel could participate in this program . . .

Transcript, Sept. 27, 1988, at 749. When the city council decided to encourage the growth of HBEs and remedy a perceived problem of discrimination against handicapped individuals, they had not acquired any information on the number of handicapped individuals who could benefit from the establishment of such a program, or the number of businesses the city could realistically expect to participate in the sheltered market. Without such information, this court cannot find that there is a rational basis for the two percent set-aside.

Second, the transcripts of the September 27, 1988 hearing clearly indicate that the city council's arrival at the two percent figure was arbitrary. Bill No. 108 originally included a one percent set aside. At the hearing, the council discussed the wisdom of an increase to five percent. The hearing was largely an effort to arrive at a compromise. The only evidence that five percent was in any way realistic or advisable was essentially based on supposition or belief of witnesses appearing before the council. Patrick Mitchell, testifying on behalf of the State Vocational Rehabilitation Agency, stated:

> . . . I think, with all the disabled individuals out there, that they have skills to cover five percent. In other words, that there are so many skills out there from disabled people in areas and you want to get a good gob done, that you're going to find five percent disabled

people out there that can do the job for you.

Id. at 742. This is not convincing evidence that the choice of a two percent set-aside is in any way rational or realistic.

Chairman Blackwell capsulized the atmosphere of compromise in the following statement: "[s]o there has to be some agreement, some compromise, between one and five. And I believe that two would be a good number. I do not believe we should just settle for one." *Id.* at 763. Councilwoman Specter left little doubt as to the arbitrariness of the two percent figure:

> We didn't do a study to see whether or not ten percent was proper for women or the percentage for minorities was correct. We know there were a lot of women out there and a lot of minorities out there and they weren't getting their share. And we set a goal. And it was pretty arbitrary. And we sought to encourage. *And that's what this does.* (emphasis added).

Id. at 751. In addition, Sanford Hines warned that establishing anything greater than a one percent set-aside when there is an insufficient number of qualified HBE's to perform that work will only serve to promote fraud rather than the development of legitimate HBEs.

Whether the testimony is characterized as demonstrating no evidence of the number of HBEs that could realistically benefit by the two percent set-aside or as providing proof that there cannot possibly be sufficient HBEs, nothing stated at the September 27, 1988 hearing indicates that the city had

established a rational basis for its choice of a two percent set-aside. Should the city, at some later date, be able to demonstrate that there has been prior discrimination against HBEs in the city procurement process, and show that there are a specific number of handicapped businesses, existing or in the formation stage, that could realistically perform a given percentage of city contracts, a set-aside program established under those circumstances would withstand the rational basis test. The city council actually conceded that the choice of the two percent number was arbitrary, indicating to the court that there is no rational relationship between the city's conclusion that there exists unjustified discrimination against the disabled and the city's establishment of a mandatory set-aside of procurement contracts to eradicate that discrimination. Accordingly, the HBE set-aside fails to withstand the level of constitutional scrutiny applicable to classifications based on handicapped status, and must be struck down.

4. *The Regulations*

Plaintiffs also challenge the constitutionality of the Regulations adopted by the MBEC under § 17-504(e) of the Ordinance. These Regulations must fall for the following reasons. Firstly, as discussed above, the court will strike down the Ordinance creating the MBEC. Secondly, the Regulations were devised to implement the Ordinance, and thus inseparably linked to it. Because the Ordinance will be declared unconstitutional, these Regulations cannot stand.

Thirdly, the "sheltered market," not in the Ordinance proper but lurking in the Regulations, is suspect by its terms. It has the potential for mischief and cannot stand. As stated above, *see supra* p. 1280, the "sheltered market" program established by

the MBEC Regulations enables the city to reserve certain contracts for bidding *only* by D-MBEs, D-FBEs and D-HBEs. This "sheltered market" program exists in addition to the fifteen, ten and two percent set-asides created by the Ordinance. Moreover, the Regulations do not limit the number or dollar amount of city contracts that may be reserved for the sheltered market. The program thus vests unnamed city officials with totally unbridled discretion to discriminate on the basis of race, gender or handicap by placing city contracts in this sheltered market. For the reasons discussed above in subsections one, two and three of section "D" of this opinion this program is blatantly unconstitutional. The record before the court did exhibit some evidence, albeit insufficient, attempting to justify the establishment of the set-asides, however, the city has not offered even the slightest justification for this independent sheltered market principle. Examined in light of the burden placed on the city by the *Croson* decision, the sheltered market concept in the MBEC Regulations is a resistible force on a head-on collision course with an immovable object—the Equal Protection Clause of the United States Constitution—and consequently cannot survive.

IV. CONCLUSION

The Supreme Court's decisions on affirmative action during the last decade have left the lower courts with a mixed bag of principles, standards and rules that must be sifted through to determine the proper course to follow in determining constitutionality. Those in government charged with legislating a constitutional course in their many endeavors understandably view constitutionality as a moving target and, thus, it is not good ground for criticism that the target was missed. Despite the ambiguity frequently cited by lower courts, *see Shurberg*

Broadcasting, 876 F.2d at 910; *Milwaukee Co. Pavers*, 707 F.Supp. at 1021-22, *Croson* sent a dramatically clear message. The *Croson* decision did not completely bar the institution of race-conscious programs designed to change ingrained patterns of discrimination in certain industries. What it plainly did was to place a heavy burden on the locality to prove that the program was strictly remedial. In its wake, many local set-aside ordinances have been enjoined or ruled unconstitutional. *See e.g., Michigan Road Builders Ass'n, Inc. v. Milliken, supra; The Cone Corporation v. Hillsborough Co., supra; Milwaukee Co. Pavers Assn v. Fiedler, supra; American Subcontractors Ass'n, Georgia Chapter v. Atlanta*, 259 Ga. 14, 376 S.E.2d 662 (1989).

Having examined the entire legislative record of Chapter 17-500 of the Philadelphia Code, this court finds that the race- and ethnicity-based set-asides in the Ordinance suffer from the same evidentiary defects as the Richmond Plan. It was a lack of specific identified evidence of prior systematic discrimination by the enacting body in the relevant industry that led the *Croson* court to overturn the Richmond Plan. The absence of such evidence from the legislative history of Chapter 17-500 and the striking similarity between the two set-aside programs prevents this court from distinguishing the Ordinance and its Regulations from the Plan invalidated in *Croson*. This court holds, as a matter of law, that the MBE set-aside in the Philadelphia Ordinance and the implementing Regulations violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and accordingly the court will grant summary judgment in favor of the plaintiffs.

As stated previously in this opinion, *Croson* was limited to a discussion of the appropriate standard of review of race- and ethnicity-based classifications. This court concludes that the

reasoning of the Supreme Court in combination with the level of review announced in other cited Supreme Court decisions can be compared and applied to arrive at an appropriate standard of review to evaluate gender- and handicapped-based classifications as well. As a matter of law, for the reasons discussed above, these gender- and handicapped-based classifications must also be invalidated as violative of the Equal Protection Clause, as they are not, supported by adequate evidence even when held to lesser levels of review. Accordingly, the court will also grant summary judgment in favor of the plaintiffs with regard to those portions of the Ordinance.

An appropriate Order will be entered.

APPENDIX I — RELEVANT STATUTES AND CONSTITUTIONAL PROVISION

28 U.S.C. § 1254

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, c. 646, 62 Stat. 928; June 27, 1988, Pub.L. 100-352, § 2(a), (b), 102 Stat. 662.)

28 U.S.C. § 1291

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal

Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Apeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub.L 85-508, § 12(e), 72 Stat. 348; Apr. 2, 1982, Pub.L. 97-164, Title I, § 124, 96 Stat. 36.)

28 U.S.C. § 1331

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L 85-554, § 1, 72 Stat. 415; Oct. 21, 1976, Pub.L. 94-574,§ 2, 90 Stat. 2721; Dec. 1, 1980, Pub.L. 96-486, § 2(a), 94 Stat. 2369.)

28 U.S.C. § 1343

§ 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his personal property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section —

(1) the District of Columbia shall be considered to be a State: and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub.L. 85-315, Part III, § 121, 71 Stat. 637; Dec. 29, 1979, Pub.L. 96-170, § 2, 93 Stat. 1284.)

Appendix 1

United States Constitution

Amendment XIV [1968]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member

of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX J— PHILADELPHIA CODE, CHAPTER 17-500, ORDINANCES AND REGULATIONS

Explanation:
[Brackets] indicate matter deleted.
Italics indicate new matter added.

Amending title 17 of the Philadelphia Code by adding Chapter 17-400, establishing goals for the participation of Minority and Female Owned Businesses in the awarding of City contracts including but not limited to supplies and services, equipment, materials and public works construction; establishing a Minority Business Enterprise Council; providing procedures and penalties to monitor and enforce compliance.

WHEREAS, It is the policy of the City of Philadelphia that public funds from the City Treasury be used to support and encourage participation in the awarding of City contracts for supplies and services, equipment, materials and public works construction regardless of race, color, sex, religion, national origin, or ancestry; and

WHEREAS, It is the policy of the City of Philadelphia that Minority and Female Owned Businesses have a fair and equitable opportunity to participate in City contracts for supplies and services, equipment, materials and public works construction; and

WHEREAS, It is the policy of the City of Philadelphia to encourage full employment among its citizens regardless of their race, color, sex, religion, national origin or ancestry; and

WHEREAS, As in the City of Philadelphia Minorities constitute approximately forty-six percent of the population

including thirty-eight percent Black, five percent Spanish surname, two percent Oriental and one percent Indian and women constitute approximately fifty percent of the population; and

WHEREAS, A pattern of past and present racial, sexual and economic discrimination have unfairly limited the ability of Minority and Female Owned Businesses to compete for an equitable share of such contracts with the city of Philadelphia; and

WHEREAS, The citizens of Philadelphia share a commitment to the eradication of present manifestations of such discrimination; and

WHEREAS, The City Council declares that the legislation has as its most important intent and purpose the Economic Development of the minority and female owned business community through a "sheltered market" process; and

WHEREAS, A series of goals for Minority and Female Owned Business participation would increase such participation and eradicate such manifestations and so that they will reach economic parity with majority business at large; and

WHEREAS, The City Council declares that it serves a public purpose and is in the best interest of the City of Philadelphia to promote and encourage Minority and Female Owned Businesses; now therefore

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The Council of the City of Philadelphia hereby ordains:

Title 17 of the Philadelphia Code, titled, "Contracts and Procurement," is hereby amended by adding a new chapter to read as follows:

Title 17. *CONTRACTS AND PROCUREMENT*

CHAPTER 17-400: GOALS FOR THE PARTICIPATION OF MINORITY AND FEMALE OWNED BUSINESSES IN CITY CONTRACTS

SECTION 17-401. *DEFINITIONS*

For the purpose of this Chapter the following terms shall have the following respective definitions:

(1) *MINORITY OWNED BUSINESS* shall mean,

(a) a sole proprietorship where the sole proprietor is a minority person; or

(b) a business corporation where fifty-one percent of the interests in such corporation are beneficially owned by minority person(s) and minorities occupy the majority of management and Board positions and control all decisions concerning the corporation; or

(c) a partnership where fifty-one percent of the partnership interests in such partnership are beneficially owned by minority person(s) and minorities occupy the majority of management and partnership positions and control all decisions concerning the partnership; or

(d) any other business or professional entity where fifty-one percent of the interests are beneficially owned by minority person(s) and minorities occupy the majority of Management and Board positions and control all decisions concerning the entity.

(2) *FEMALE OWNED BUSINESS* shall mean,

(a) a sole proprietorship where the sole proprietor is a woman; or

(b) a business corporation where fifty-one percent of the interests in such corporation are beneficially owned by women and women occupy the majority of management and Board positions and control all decisions concerning the corporation; or

(c) a partnership where fifty-one percent of the partnership interests in such partnership are owned by women and women occupy the majority of management and partnership positions and control all decisions concerning the entity; or

(d) any other business or professional entity where fifty-one percent of the interests are owned by women and women occupy the majority of management and Board positions and control all decisions concerning the entity.

(3) *JOINT VENTURES*

None of the definitions of ownership expressed in parts (1) and (2) of this section shall preclude or exclude joint ventures, venture partnerships, and any other joint or multiple firm arrangement from obtaining any benefit under this ordinance so long as:

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(a) A Minority and/or Female owned business can demonstrate substantial benefit derived from such an arrangement; and

(b) The Minority and/or Female owned participant is substantially involved in all phases of the contract including bidding, planning, staffing and daily management; and

(c) Such an arrangement is customary; and

(d) Such arrangements are approved by the Minority Business Enterprise Council ("MBEC").

(4) *SUB-CONTRACTING*

None of the definitions expressed in parts (1) and (2) of this Section shall preclude or exclude Sub-Contracting so long as:

(a) the Minority and/or Female owned contractor perform at least fifty percent (50%) of the contracting effort, excluding the costs of materials, goods and supplies, with its own organization and resources; and

(b) The MBEC approves such sub-contracting and the contractor obtains a certified statement thereto; and

(c) For contracts up to one million dollars ($1,000,000) the Minority and/or Female owned prime contractor shall perform at least fifty percent (50%) of the on-site work with its own force, excluding the costs of materials, goods, supplies and equipment; and

(d) For contracts greater than one million dollars ($1,000,000) the Minority and/or Female owned contractor shall perform that portion of on-site work with its own work force which demonstrates that he or she is fiscally and managerially responsible as the prime or the sub-contractor, and demonstrates that it derives substantial benefit from the contract; and

(e) The Minority and/or Female owned business either as prime or sub-contractor is substantially involved in all phases of the contract including bidding, planning, staffing and daily management.

(5) *MINORITY PERSON* shall include:

(a) Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans (persons with origins from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, U.S. Trust Territory of the Pacific Islands, Northern Mariana Islands, Laos, Cambodia, or Taiwan.

(6) *JOINT VENTURES* — Venture Partnerships and other multiple firm arrangements means a combination of contractors or firms performing a specific contract in which Minority and/or Female owned businesses participate in the net profits or net loss.

(7) *SUB-CONTRACTING* — Means the specific allocation of work by a Minority and/or Female owned business as prime contractor to other contractors for specific tasks to be performed thereunder or the allocation of work by a majority owned business to a Minority and/or Female owned business as sub-contractor.

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(8) *JOINT VENTURES* — Means Venture Partnerships, other multiple firm arrangements and sub-contracting shall require that fifty percent (50%) of the effort excluding the cost of materials goods, and supplies shall be with Minority and/or Female owned firms.

(9) *SHELTERED MARKET* — Means a process whereby contracts or sub-contracts are designated before solicitation of bids for limited competition from Minority and/or Female owned businesses on either a negotiated or competitive bid basis.

(10) *FEMALE* — shall include persons of the female gender.

(11) *CITY CONTRACTS* — shall include all City of Philadelphia contracting whether by the competitive bid process, single source contracting or other procurement processes and whether or not done in conjunction with other governmental entities, public or private agencies.

SECTION 17-402. *APPLICABILITY*

[This Chapter shall be applied to all City Contracts, all Departments and Agencies of the City of Philadelphia, and all other commissions, councils, departments and agencies which receive any funding from the City or derive any part of their authority and/or existence from city laws and ordinances.]

This Chapter shall be applied to all City Contracts and all City of Philadelphia Departments, Agencies, Authorities, Commissions and Councils. This Ordinance shall be effective for ten (10) years with the right of the Council to enact an Ordinance extending this Ordinance and additional term of ten

(10) years upon the advise of the Minority Business Enterprise Council created by this Ordinance.

SECTION 17-403 *MINORITY AND FEMALE OWNED BUSINESS CITY CONTRACTING GOALS.*

The following goals for Minority and Female Owned Business participation shall serve as initial goals for the City of Philadelphia to pursue. These goals shall not be construed as absolute upper limits on the amount of City Contracts such entities are able to participate in. These goals shall be applicable to all types of City Contracting individually and equally. The goals shall be:

(a) Fifteen percent (15%) City Contract participation for Minority Owned businesses; and

(b) Ten percent (10%) City Contract participation for Female Owned Businesses.

The above stated percentages relate to the total dollar amount of City Contracts during each of the City of Philadelphia's Fiscal years. In no event shall the percentages be calculated by counting one business' participation in both the Minority Owned and Female Owned Business categories. In calculating the above percentages only that percentage of contracts awarded under joint venture and/or subcontracting arrangements which represents the Minority and/or Female Owned business' participation on such contracts shall be included. The above percentages shall be calculated by examining each City department and agency and each contract type independently. In no event shall the percentages be considered as having been met by participation in less than all contract types.

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SECTION 17-404 *MINORITY BUSINESS ENTERPRISE COUNCIL*

To help implement, monitor and enforce the goals of this ordinance there shall be created the Minority Business Enterprise Council ("MBEC") to be a part of the Mayor's office, the MBEC shall be composed of the Mayor's representative, the Managing Director of the City of Philadelphia or his duly appointed representative, the Procurement Commissioner or his duly appointed representative, *a representative to be appointed by the President of City Council.* In addition there shall be [six] *four* representatives from Minority and Female Owned Businesses, [four] *three* to be chosen from a list of candidates submitted by Minority Business Associations in the City of Philadelphia and [two] *one* to be chosen from Female Business Associations. *A ninth member to be appointed by majority vote of the other eight representatives. The Mayor shall within thirty (30) days from the date of the enactment of this Ordinance appoint members of the Council, and notify City Council of the same. The Mayor shall, by transferring existing contract compliance officials and support staff from executive agencies or departments, make available to the MBEC sufficient administrative staff and the necessary support services within sixty (60) days after the effective date of this act. The Mayor shall also appoint a staff director from existing government officials.* MBEC's authority and responsibility shall be to:

(a) Devise a certification procedure to assure that business taking advantage of this Ordinance are legitimate Minority or Female owned businesses.

[(a)]*(b)* Ascertain, within ninety (90) days of the enactment of this ordinance, the total number of Minority and

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Female Owned Businesses in the Philadelphia Standard Metropolitan Statistical Area. Maintain a listing of all such businesses for referral by all City departments and agencies.

[(b)]*(c)* Survey such businesses ascertained in (a) to establish past and current participation levels.

[(c)]*(d)* Establish semi-annual reporting requirements for all City departments and agencies to document the percentage of their Contracts which have been awarded to Minority Owned and Female Owned Businesses.

[(d)]*(e)* Devise, within ninety (90) days of the enactment of this Ordinance appropriate policies, regulations and procedures for assuring the participation of Minority and Female Owned Businesses in various City contracts including a sheltered market process and report such regulations back to City Council. The regulations shall provide for a preference for those businesses located in the Philadelphia SMSA.

[(e)]*(f)* Devise appropriate procedures for monitoring and enforcing compliance with the goals established in this Chapter.

[(f)]*(g)* Devise procedures for the waiver of these participation goals in appropriate circumstances.

[(g)]*(h)* Devise and operate a Grievance Procedure for the processing of Complaints by any Minority or Female owned business aggrieved by his treatment in seeking to participate in City Contracts and for those aggrieved by determinations made as a result of this Chapter.

[(h)]*(i)* Submit a written semi-annual report to the Mayor

and City Council indicating the process made toward achieving the goals set out above. Said report shall include, but not be limited to a summary of City contracts let during the relevant periods, and the extent and percentage of Minority and Female Owned Business participation, and recommendations as to appropriate future goals. Said report shall be available for public review.

[i]*(j)* Develop its own operating procedures, staffing needs, physical facilities requirements and operating budget.

[(j)]*(k)* MBEC shall have access to all records and files of all agencies and departments [in developing this program in order to monitor and investigate compliance.] *which relate to procurement in order to monitor and investigate compliance* MBEC shall also be empowered to institute a new procurement record keeping procedure for all agencies and departments in order to facilitate its tasks.

[(k)]*(l)* Nothing in this ordinance or that MBEC formulates shall preclude or exclude those business practices or that conduct of business generally accepted throughout the business community, including *inter alia* debt or equity financing requiring that a minority or female owned business pledge equity interest or other assets as security against default, or to provide membership on their Boards of Directors for non-minority persons so long as:

(m) Any MBEC member who has direct financial or personal interest in any measure pending before the MBEC shall disclose this fact to the MBEC and refrain from participating in the determination upon such measure, and shall be subject to the provisions of the City's Ethic Code.

(1) Such practices do not abridge or contravene the definitions and purposes set out in this ordinance; and

(2) The MBEC approves of such practices.

SECTION 17-405 — *WAIVER*

Based upon the procedures developed by MBEC pursuant to Section 17-404(f), MBEC shall have the power to waive the herein stated percentage goals for particular types of contracts when no minority or female contractors can be found. Such waiver is subject to review before the MBEC upon petition by an aggrieved minority or female contractor or other interested person.

SECTION 17-406 — *PENALTIES*

Any City department or agency that fails to meet the goals established in Section 17-403 and which is also unable to demonstrate to the MBEC that it has made a good faith effort to comply with this Chapter and/or had failed to adhere to the procedures established pursuant to Section 17-404 shall be subject to the following actions

(a) Cancellation of [present] *any* contract[s] *awarded after the effective date of this ordinance to the extent MBEC deems appropriate* (all future City contracts after enactment of this ordinance shall contain a conditional clause whereby the contracting parties acknowledge and agree to possible cancellation upon determination that this Chapter has been violated, MBEC to develop the specific language).

(b) MBEC may designate that as to a certain number

of and/or dollar amount of future contracts to be let by an agency or department responsible Minority and/or Female owned businesses bidding shall have an absolute first right to such contracts.

[(c) Individuals in charge of such departments and agencies and the department and agencies as entities shall be subject to fine to be determined by the MBEC. Such fines shall be paid over to the MBEC which shall utilize the funds to conduct programs to increase Minority and Female owned business participation in City contracting]

(c) If a department, agency, authority commission. etc., or individual fails to comply with the provisions of this Ordinance or with the regulations of the MBEC, the MBEC is empowered to petition the Common Pleas Court for a judicial order to enforce compliance. Intentional violations of this ordinance or the MBEC's regulations shall also result in a fine of $300.

(d) Any Minority or Female owned business aggrieved by a violation of this Ordinance or by a violation of the procedures hereafter established pursuant to the authority granted to the MBEC may appeal such grievance or determination according to the provisions of Section 17-101(4)(5) of this Chapter and shall be entitled to receive [Treble Damages] *compensatory and punitive damages* upon a finding in their favor.

SECTION 17-407 — *SEVERABILITY*

If any section, subsection, clause, sentence or phrase of this Ordinance is found to be unlawful by reason of other superior

laws of the United States or the Commonwealth of Pennsylvania, such a determination shall not affect the validity of the remaining portions of this Ordinance. The applicable law in determining the parties rights and liabilities under this Ordinance are the laws of the Commonwealth of Pennsylvania.

17-408 EFFECTIVE DATE

This ordinance shall be effective immediately.

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AN ORDINANCE

Explanation:
[Brackets] indicate matter deleted.
Italics indicate new matter added.

Amending Chapter 17-400 of The Philadelphia Code, entitled Goals for the Participation of Minority and Female Owned Businesses in City Contracts, by renumbering; and by making certain additions and deletions to provisions for the administration, implementation and enforcement of goals for Minority and Female Owned Business participation in City contracts.

The Council of the City of Philadelphia hereby ordains:

SECTION 1. The Whereas Clause of Bill No. 1174A, passed by Council on May 13, 1982 following return of the Bill with the Mayor's disapproval, is hereby amended as follows:

* * *

[WHEREAS, the City Council declares that the legislation has as its most important intent and purpose the Economic Development of the minority and female owned business community through a "sheltered market" process, and]

* * *

WHEREAS, The City council declares that it serves a public purpose and is in the best interest of the City of Philadelphia to promote and encourage *economic development* of Minority and

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Female Owned Businesses *and their participation as prime contractors and subcontractors;* now, therefore;

SECTION 2. Chapter 17-400 of The Philadelphia Code is hereby amended to renumber the Chapter and to make certain additions and deletions as follows:

CHAPTER [17-400] *17-500:* GOALS FOR THE PARTICIPATION OF MINORITY AND FEMALE OWNED BUSINESSES IN CITY CONTRACTS

SECTION [17-401] *17-501.* DEFINITIONS

For the purpose of this Chapter, the following terms shall have the following respective definitions:

(1) MINORITY PERSON shall mean a person who is a citizen or lawful permanent resident of the United States and who is:

(a) Black (a person having origins in any of the black racial groups in Africa);

(b) Hispanic (a person of Spanish or Portuguese culture with origins in Mexico, South or Central America, or the Caribbean Islands, regardless of race);

(c) Asian American (a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent or the Pacific islands); or

(d) American Indian or Alaskan Native (a person having origins in any of the original peoples of North America).

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(2) FEMALE shall mean persons of the female gender.

[(1)] *(3)* MINORITY OWNED BUSINESS shall mean,

(a) a sole proprietorship where the sole proprietor is a minority person; or

(b) a business corporation where fifty-one percent *(51%)* of the interests in such corporation are beneficially owned by minority [person(s)] *persons* and [minorities] *minority persons* occupy the majority of management and Board positions and control all decisions concerning the corporation; or

(c) a partnership where fifty-one percent *(51%)* of the partnership interests in such partnership are beneficially owned by minority [person(s)] *persons* and [minorities] *minority persons* occupy the majority of management and partnership positions and control all decisions concerning the partnership; or

(d) any other business or professional entity where fifty-one percent *(51%)* of the interests are beneficially owned by minority [person(s)] *persons* and [minorities] *minority persons* occupy the majority of management and Board positions and control all decisions concerning the entity.

[(2)] *(4)* FEMALE OWNED BUSINESS shall mean,

(a) a sole proprietorship where the sole proprietor is a [woman] *female;* or

(b) a business corporation where fifty-one percent *(51%)* of the interests in such corporation are beneficially owned

by [women]*females* and [women]*females* occupy the majority of management and board positions and control all decisions concerning the corporation; or

(c) a partnership where fifty-one percent *(51%)* of the partnership interests in such partnership are owned by [women] *females* and [women] *females* occupy the majority of management and partnership positions and control all decisions concerning the entity; or

(d) any other business or professional entity where fifty-one percent *(51%)* of the interests are owned by [women]*females* and [women] *females* occupy the majority of management and Board positions and control all decisions concerning the entity.

[(3) JOINT VENTURES

None of the definitions of ownership expressed in parts (1) and (2) of this sections shall preclude or exclude joint ventures, venture partnerships, and any other joint or multiple firm arrangement from obtaining any benefit under this ordinance so long as:

(a) A Minority and/or Female owned business can demonstrate substantial benefit derived from such an arrangement: and

(b) The Minority and/or Female owned participant is substantially involved in all phases of the contract including bidding, planning, staffing and daily management: and

(c) Such an arrangement is customary; and

(d) Such arrangements are approved by the Minority Business Enterprise Council ("MBEC").]

[(4) SUBCONTRACTING

None of the definitions expressed in parts (1) and (2) of this Section shall preclude or exclude Sub-Contracting so long as:

(a) The Minority and/or Female owned contractor perform at least fifty percent (50%) of the contracting effort, excluding the cost of materials, goods, and supplies, with its own organization and resources; and

(b) The MBEC approves such sub-contracting and the contractor obtains a certified statement thereto; and

(c) For contracts up to one million dollars ($1,000,000) the Minority and/or Female owned prime contractor shall perform at least fifty percent (50%) of the on-site work with its own force, excluding the cost of materials, goods, supplies and equipment; and

(d) For contracts greater than one million dollars ($1,000,000) the Minority and/or Female owned contractor shall perform that portion of on-site work with its own work force which demonstrates that he or she is fiscally and managerially responsible as the prime or the sub-contractor, and demonstrates that it derives substantial benefit from the contract; and

(e) The Minority and/or Female owned business either as prime or sub-contractor is substantially involved in all phases of the contract including bidding, planning, staffing and daily management.]

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[(5) MINORITY PERSON shall include:

(a) Black Americans, Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans (persons with origins from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, U.S. Trust Territory of the Pacific Islands, Northern Mariana Islands, Laos, Cambodia, or Taiwan.]

(5) SHELTERED MARKET shall mean a City-wide procurement system whereby certain contracts are selected and specifically set aside for Minority or Female Owned Businesses or both on a competitive bid or negotiated basis.

[(6) JOINT VENTURES — Venture Partnerships and other multiple firm arrangements means a combination of contractors or firms performing a specific contract in which Minority and/or Female owned businesses participate in the net profits or net loss.]

(6) TYPES OF CITY CONTRACTS shall mean all City contracts, whether competitively bid or negotiated, according to the following classes:

(a) Vending, to include material, equipment, services and supplies;

(b) Construction; and

(c) Personal and professional services.

[(7) SUB-CONTRACTING — Means the specific allocation of work by a Minority and/or Female owned business

as prime contractor to other contractors for specific tasks to be performed thereunder or the allocation of work by a majority owned business to a Minority and/or Female owned business as sub-contractor.]

(7) AGENCY shall mean any City of Philadelphia office, department, independent board or independent commission created by the Home Rule Charter and shall include the Council of the City of Philadelphia.

(8) PERSON shall mean a corporation, partnership or association, or any combination thereof, as well as a natural person.

[(8) JOINT VENTURES — Means Venture Partnerships, other multiple firm arrangements and sub-contracting shall require that fifty percent (50%) of the effort excluding the cost of material goods, and supplies shall be with Minority and/or Female owned firms.]

[(9) SHELTERED MARKET — Means a process whereby contracts or sub-contracts are designated before solicitation of bids for limited competition from Minority and/or Female owned businesses on either a negotiated or competitive bid basis.]

[(10) FEMALE — shall include persons of the female gender.]

[(11) CITY CONTRACTS — shall include all City of Philadelphia contracting whether by the competitive bid process, single source contracting or other procurement processes and whether or not done in conjunction with other government entities, public or private agencies.]

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SECTION [17-402. APPLICABILITY] *17-502. IMPLEMENTATION AND APPLICABILITY*

(1) The powers and duties created by this Chapter shall be vested in and exercised by the Office of the Director of Finance, such duties to include the implementation of the findings, recommendations, proposals and other actions of the Minority Business Enterprise Council, acting pursuant to Sections 17-504, 17-505, and 17-506. In the event that the Director of Finance shall determine not to implement such actions, the Minority Business Enterprise Council may seek further review by the Mayor. The determination of the Mayor shall be final.

(2) This Chapter shall be applied to all *types of* City [Contracts] *contracts* and all City [of Philadelphia Departments, Agencies, Authorities, Commissions and Councils] *agencies.* This [Ordinance] *Chapter* shall be effective for [ten] *seven* [(10)] *(7)* years [with the right of Council to enact an Ordinance extending this Ordinance and additional term of ten (10) years upon the advice of the Minority Business Enterprise Council created by this Ordinance].

SECTION [17-403] *17-503.* MINORITY AND FEMALE OWNED BUSINESS CITY CONTRACTING GOALS

(1) The following goals for Minority and Female Owned business participation shall serve as initial goals for the City of Philadelphia to pursue *during the first full Fiscal Year. Prior to the commencement of the first full Fiscal Year, to the extent the staffing and regulations pursuant to Section 17-504 are completed, best efforts shall be made to implement Minority and Female Owned Business participation in City contracts.*

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These goals shall not be construed as absolute upper limits on the amount of City [Contracts] *contracts* such entities are able to participate in. These goals shall be applicable to all types of City [contracting] *contracts* [individually and equally]. The goals shall be:

(a) Fifteen percent (15%) City [Contract] *contract* participation for Minority Owned Businesses; and

(b) Ten percent (10%) City [Contract] *contract* participation for Female Owned Businesses.

The above stated percentages relate to the total dollar amount of City [Contracts] *contracts* during each of the City of Philadelphia's Fiscal Years, *calculated by examining independently each type of City contract for each agency which lets such contracts.* [In no event shall the percentages be calculated by counting one business participation in both the Minority Owned and Female Owned Business categories.] *For purposes of calculating the goals for participation in City contracts, a business shall be considered as either a Minority Owned or a Female Owned Business, but not both.* [In] *Subject to the provisions of subsections (2), (3) and (4), in* calculating the above percentages only that percentage of contracts awarded under joint venture [and/] or sub-contracting arrangements which represents the Minority [and/] or Female Owned Business' participation on such contracts shall be included. [The above percentages shall be calculated by examining each City department and agency and each contract type independently.] In no event shall the percentages be considered as having been met by participants in less than all [contract] types *of City contracts.*

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(2) For purposes of calculating the percentages in subsection (1), the total dollar amount of a contract shall be counted towards Minority or Female Owned Business participation, when:

(a) In the case of a prime contract, the prime contractor is a Minority or Female Owned Business, so long as:

(i) For contracts up to one million dollars ($1,000,000) the Minority or Female Owned prime contractor shall perform at least fifty percent (50%) of the on-site work with its own force, excluding the cost of materials, goods, supplies and equipment; and

(ii) For contracts greater than one million dollars ($1,000,000) the Minority or Female Owned prime contractor shall perform that portion of on-site work with its own work force which demonstrates that it is fiscally and managerially responsible as the prime contractor, and demonstrates at the time of contract is let that it derives substantial benefit from the contract.

(b) In the case of a subcontract, so long as the subcontractor is a Minority of Female Owned Business and is substantially involved in all phases of the subcontract, including bidding, planning, staffing and daily management.

(3) For purposes of calculating the percentages in subsection (1), in the case of joint venture, venture partnership and any other joint or multiple firm arrangement:

(a) The total dollar amount of a contract shall be

counted towards Minority or Female Owned Business participation so long as fifty-one percent (51%) of the interests in the arrangement are beneficially owned by Minority or Female Owned Businesses; or

(b) Where less than fifty-one percent (51%) of the interests in the arrangement are beneficially owned by Minority or Female Owned Businesses, the total dollar amount of the interest of a Minority or Female Owned Business participant in a contract shall be counted towards Minority or Female Owned Business participation so long as:

(i) A Minority or Female Owned Business can demonstrate at the time the contract is let that it derives substantial benefit from such arrangement;

(ii) The Minority or Female Owned business participant is substantially involved in all phases of the contract including bidding, planning, staffing and daily management;

(iii) Such an arrangement is customary; and

(iv) Such arrangement is approved by the Minority Business Enterprise Council.

(4) In all cases where subsections (2) and (3) do not apply, the calculation of such percentages shall be based on the dollar amount which represents the extent of participation by a Minority or Female Owned Business in the contract.

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SECTION [17-404] *17-504.* MINORITY BUSINESS ENTERPRISE COUNCIL

(1) To help implement, monitor and enforce the goals of this [ordinance] *Chapter* there shall be created the Minority Business Enterprise Council ("MBEC") to be a part of the [Mayor's Office,] *Office of the Director of Finance.* [The MBEC shall be composed of the Mayor's representative, the Managing Director of the City of Philadelphia or his duly appointed representative, the Procurement Commissioner or his duly appointed representative, a representative to be appointed by the President of City Council. In addition, there shall be four representatives from Minority and Female Owned Businesses, three to be chosen from a list of candidates submitted by Minority Business Associations in the City of Philadelphia and one to be chosen from Female Business Associations. A ninth member to be appointed by majority vote of the other eight representatives.] *The Mayor shall appoint all members of the MBEC, which shall be composed as follows:*

(a) Three (3) members each to be selected from a separate list of at least ten (10) persons, each list to be submitted within fifteen (15) days of the effective date of this Chapter by (i) the Minority Brain Trust, (ii) the Minority Architects and Engineers Alliance, and (iii) the Coalition of Minority Contractors, Inc. In the event that any person shall appear on more than one list, the Mayor shall have the right to request that a substitute be named. Each such member shall be the Chief Executive Officer of a bona fide Minority Owned Business and a member of the organization from whose list he has been selected;

(b) One (1) member who shall be the Chief Executive Officer of a Female Owned Business;

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(c) Four (4) members selected at the discretion of the Mayor, except the Director of Finance shall not be selected; and

(d) One (1) member to be selected by the other eight members of the MBEC.

The Mayor shall within thirty (30) days from the date [of the enactment of this Ordinance] *he has received the final lists* appoint members of the [Council] *MBEC,* and notify City Council of the same. The Mayor shall [, by transferring existing contract compliance officials and support staff from executive agencies or departments,] make available to the MBEC sufficient administrative staff and the necessary support services within sixty (60) days [after] *from* the effective date of this [act] *Chapter.* The Mayor shall also appoint a staff director [from existing government officials].

(2) MBEC's authority and responsibility shall be to:

(a) Devise a certification procedure to assure that businesses taking advantage of this [Ordinance] *Chapter* are legitimate Minority or Female Owned Businesses.

(b) Ascertain, within ninety (90) days of the [enactment of this ordinance] *completion of staffing pursuant to Section 17-504(1),* the total number of Minority and Female Owned Businesses in the Philadelphia Standard metropolitan Statistical Area. [Maintain] *The MBEC shall maintain* a listing of all such businesses for referral by all [City departments and] agencies.

(c) Survey such businesses ascertained in (a) to establish past and current participation levels.

(d) Establish [semi-] annual reporting requirements for all [City departments and] agencies to document the percentage of [their Contracts] *contracts* which have been [awarded] *let* to Minority [Owned] and Female Owned Businesses *by the reporting agency.*

[(e) Devise, within ninety (90) days of the enactment of this Ordinance appropriate policies, regulations and procedures for assuring the participation of Minority and Female Owned Businesses in various City contracts including a sheltered market process and report such regulations back to City Council. The regulations shall provide for a preference for those businesses located in the Philadelphia SMSA.]

(e) Devise, within ninety (90) days from the completion of staffing pursuant to Section 17-504(1), such reasonable regulations as may be necessary and appropriate for the implementation of the powers and performance of the duties created by this Chapter. The MBEC shall, from time to time, devise such additional regulations as may be necessary and appropriate for the implementation of this Chapter.

(f) Devise, within ninety (90) days from the completion of staffing pursuant to Section 17-504(1), appropriate policies, regulations and procedures for including the participation of Minority and Female Owned Businesses in prime contracts with the City. The affirmative programs to be reviewed by the MBEC in this regard shall include, but shall not be limited to the following: (i) including qualified Minority and Female Owned Businesses on solicitation lists; (ii) assuring that Minority and Female Owned Businesses are solicited whenever they are potential sources; (iii) structuring contract requirements, when economically feasible, to permit maximum participation of

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Minority and Female Owned Businesses; (iv) investigating the potential of blanket bonding programs for small construction jobs; (v) investigating and recommending the use of other legally permissible means of fostering the award of prime contracts to Minority and Female Owned Businesses, and (vi) investigating and making recommendations concerning the use of the Sheltered Market process.

(g) Devise, within ninety (90) days from the completion of staffing pursuant to Section 17-504(1), regulations for the award of contracts pursuant to the Sheltered Market.

(h) Recommend contractual language which provides that compliance with Minority and Female Owned Business participation requirements is material to the City contract and further provides for remedies including but not limited to termination of the contract in the event of noncompliance.

[(f)] *(i)* Devise appropriate procedures for monitoring and enforcing compliance with the goals established in this Chapter.

[(g)] *(j)* Devise procedures for the waiver of these participation goals in appropriate circumstances.

[(k) MBEC shall have access to all records and files of all agencies and departments which relate to procurement in order to monitor and investigate compliance. MBEC shall also be empowered to institute a new procurement record keeping procedure for all agencies and departments in order to facilitate its tasks.]

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[(h) *(k)* Devise and operate a Grievance Procedure for the processing of complaints by any [Minority or Female owned business aggrieved by his treatment in seeking to participate in City Contracts and for those aggrieved by determinations made as a result of this Chapter] *person aggrieved by any finding, recommendation, proposal or other action implemented pursuant to this Chapter.*

[(l) Nothing in this ordinance or that MBEC formulates shall preclude or exclude those business practices or that conduct of business generally accepted throughout the business community, including inter alia debt or equity financing requiring that a Minority or Female Owned Business pledge equity interest or other assets as security against default, or to provide membership on their Boards of Directors for non-minority persons so long as:

(m) Any MBEC member who has direct financial or personal interest in any measure pending before the MBEC shall disclose this fact to the MBEC and refrain from participating in the determination upon such measure, and shall be subject to the provisions of the City's Ethics Code.

(1) Such practices do not abridge or contravene the definitions and purposes set out in this ordinance; and

(2) The MBEC approves of such practices.]

[(i)] *(l)* [Submit] *Issue* a written [semi-] annual report [to the Mayor and City Council] indicating the progress made toward achieving the goals set out above. Said report shall include, but not be limited to a summary of City contracts let during the relevant periods, [and] the extent and percentage of

Minority and Female Owned Business participation, and recommendations as to the appropriate future goals. [Said] *The annual* report shall be available for public review.

[(j)] *(m)* [Develop] *Propose* its own operating procedures, staffing needs, physical facilities requirements and operating budget.

(3) The Director of Finance shall, upon the request of the MBEC, assemble and furnish to the MBEC such procurement records and documents of the various agencies as are necessary for the monitoring and compliance investigation by the MBEC. MBEC shall also be empowered to recommend new procurement record keeping procedures for all agencies to facilitate compliance with this Chapter. Nothing in this Chapter shall obligate the disclosure by City officers or employees of information or documents which may be regarded as confidential or privileged under Federal, State, or local law.

[*SECTION 17-405 — WAIVER*

Based upon the procedures developed by MBEC pursuant to Section 17-404(f), MBEC shall have the power to waive the herein stated percentage goals for particular types of contracts when no minority or female contractors can be found. Such waiver is subject to review before the MBEC upon petition by an aggrieved minority or female contractor or other interested person.]

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SECTION 17-505. EXEMPTIONS AND WAIVERS

(1) Individual Contract Exemptions

The MBEC, on its own initiative or at the request of the affected agency, may recommend that an individual contract or contract "package" (i.e., related contracts being bid or awarded simultaneously for the same project or improvement) be made wholly or partially exempt from Minority and Female Owned Business City contracting goals prior to the advertisement for bids or solicitation of proposals, whenever there has been a determination, reduced to writing and based on the best information available at the time of the determination, that there is an insufficient number of Minority or Female Owned Businesses within the Philadelphia Standard Metropolitan Statistical Area to ensure adequate competition and an expectation of reasonable prices on bids or proposals solicited for the individual contract or contract "package" in question.

(2) Class Exemptions

(a) Creation of exempt classes of contracts

The MBEC, on its own initiative or at the request of the affected agency, may recommend that an entire class of contracts established pursuant to Section 17-503 be made exempt from Minority and Female Owned Business City contracting goals, whenever there has been a determination reduced to writing and based on the best information available at the time of the determination, that there is an insufficient number of qualified Minority or Female Owned Businesses in the Philadelphia Standard Metropolitan Statistical Area to ensure adequate

competition and an expectation of reasonable prices on bids or proposals within that class.

(b) Limitation on class exemption

Any such class exemption shall not be created for a period of more than one year at a time.

(3) Waivers

Where a particular contract requires a contractor to meet a goal established pursuant to this Chapter, the contractor shall have the right to request a waiver from such requirements. The MBEC shall recommend that the waiver be granted where the contractor demonstrates that there has been made a good faith effort to comply with the goals for Minority or Female Owned Business participation.

(4) Conflict With Other Laws

In the event that any City contract, which would otherwise be subject to the provisions of this Chapter, is or becomes subject to federal or state laws which conflict with this Chapter or actions of the City taken pursuant hereto, the provisions of federal or state law shall apply and the contract shall be interpreted and enforced accordingly.

[SECTION 17-406 — PENALTIES

Any City department or agency that fails to meet the goals established in Section 17-403 and which is also unable to demonstrate to the MBEC that it has made a good faith effort to comply with this Chapter and/or had failed to adhere to the

procedures established pursuant to Section 17-404 shall be subject to the following actions:

(a) cancellation of any contract awarded after the effective date of this ordinance to the extent MBEC deems appropriate (all future City contracts after enactment of this ordinance shall contain a conditional clause whereby the contracting parties acknowledge and agree to possible cancellation upon determination that this Chapter has been violated, MBEC to develop the specific language).

(b) MBEC may designate that as to a certain number of and/or dollar amount of future contracts to be let by an agency or department responsible Minority and/or Female Owned Business bidding shall have an absolute first right to such contracts.

(c) If a department, agency, authority, commission, etc., or individual fails to comply with the provisions of this Ordinance or with the regulations of the MBEC, the MBEC is empowered to petition the Common Pleas Court for a judicial order to enforce compliance. Intentional violations of this ordinance or the MBEC's regulations shall also result in a fine of three hundred ($300) dollars.

(d) Any Minority or Female Owned Business aggrieved by a violation of this Ordinance or by a violation of the procedures hereafter established pursuant to the authority granted to the MBEC may appeal such grievance or determination according to the provisions of Section 17-101(4)(5) of this Chapter and shall be entitled to receive compensatory and punitive damages upon a finding in their favor.]

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SECTION 17-506 — ENFORCEMENT

The MBEC shall make such findings, recommendations and proposals to the Director of Finance as are necessary and appropriate to enforce this Chapter. If, as a result of its monitoring activities, the MBEC determines that the goals set forth in Section 17-503 and those policies devised by the MBEC pursuant to Section 17-504(2)(f) are not being met by any agency, the MBEC may recommend any or all of the following actions:

(a) In the event that the MBEC determines that a person under contract with the City has failed to comply with contractual provisions requiring Minority or Female Owned Business participation, the MBEC may recommend that the City exercise its legal remedies, including, if appropriate, the termination of the contract involved.

(b) In the event that the MBEC determines that an agency is entering into contracts in a manner or at a rate which is unlikely to achieve the Minority or Female Owned Business participation goals of this Chapter, the MBEC may request that the agency furnish to it a compliance plan setting forth in detail how contracts are proposed to be awarded prospectively to achieve the goals within the then current fiscal year.

(c) If the MBEC concludes that a compliance plan submitted under subsection (b) above is unlikely to produce the Minority or Female Owned Business participation goals within the then current fiscal year, the MBEC may recommend that the agency revise its plan to provide additional opportunities for Minority and Female participation. Such recommended revisions may include, but shall not be limited to the following:

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(1) Assurances of stronger and better focused solicitation efforts to obtain more Minority and Female Owned Businesses as potential sources of supply;

(2) Division of job or project requirements, when economically feasible, into tasks or quantities to permit participation of Minority and Female Owned Businesses;

(3) Elimination of extended experience or capitalization requirements, when programmatically feasible, to permit participation of Minority and Female Owned Businesses;

(4) Identification of specific proposed contracts as particularly attractive or appropriate for participation by Minority or Female Owned Businesses, such identification to result from and be coupled with the efforts of subsections (1) through (3) above;

(5) Implementation of those regulations established pursuant to Section 17-504(2)(g) for the use of the Sheltered Market.

SECTION 17-507 — GRIEVANCES

Any person aggrieved by any finding, recommendation, proposal or other action implemented pursuant to this Chapter may file a grievance with the MBEC, which shall render a decision within twenty (20) days from the date the grievance is filed. The grievance shall be filed and determined in accordance with the procedures adopted pursuant to Section 17-504(2)(k). The decision of the MBEC may be appealed to the Director of Finance, who shall render a decision within twenty (20) days

from the date the appeal is taken. The decision of the Director of Finance shall be final.

SECTION [17-407] *17-508. SEVERABILITY*

If any section, subsection, clause, sentence or phrase of this [Ordinance] *Chapter* is found to be unlawful by reason of other superior laws of the United States or the Commonwealth of Pennsylvania, such a determination shall not affect the validity of the remaining portions of this [Ordinance] *Chapter.* The applicable law in determining the parties rights and liabilities under the [Ordinance] *Chapter* are the laws of the Commonwealth of Pennsylvania.

[SECTION 17-408. EFFECTIVE DATE

This ordinance shall be effective immediately.]

Section 3. This ordinance shall be effective immediately

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AN ORDINANCE

Explanation:
[Brackets] indicate matter deleted.
Italics indicate new matter added.

Amending Chapter 17-500 of The Philadelphia Code, entitled "GOALS FOR THE PARTICIPATION OF MINORITY AND FEMALE-OWNED BUSINESSES IN CITY CONTRACTS" by making certain additional and deletions to provisions for the administration, implementation and enforcement of goals for Minority and Female-Owned Business participation in City contracts.

WHEREAS, It is the policy of the City of Philadelphia that public funds from the City treasury be used to support and encourage participation in the awarding of City contracts for supplies and services, equipment, materials and public works construction regardless of race, color, sex, national origin, or ancestry; and,

WHEREAS, It is the policy of the City of Philadelphia that Minority and Female-Owned Businesses have a fair and equitable opportunity to participate in City contracts for supplies and services, equipment, materials and public works construction; and,

WHEREAS, It is the policy of the City of Philadelphia to encourage full employment among its citizens regardless of their race, color, sex, religion, national origin or ancestry; and

WHEREAS, As in the City of Philadelphia, Minorities constitute approximately 46% of the population including 38%

Black, 5% Spanish surname, 2% Oriental and 1% Indian and women constitute approximately 50% of the population; and,

WHEREAS, A pattern of past and present racial, sexual and economic discrimination have unfairly limited the ability of Minority and Female Owned Business to complete for an equitable share of such contracts with the City of Philadelphia; and,

WHEREAS, The citizens of Philadelphia share a commitment to the indication of present manifestations of such discrimination; and,

WHEREAS, The City Council declares that this legislation has as its most important intent and purpose the Economic Development of the minority and female owned business community; and,

WHEREAS, A series of goals for Minority and Female Owned Business Participation has been designed to increase such participation and eradicate such manifestations so that they will reach economic partly with majority businesses at large; and

WHEREAS, The City Council declare that it serves a public purpose and is in the best interest of the City of Philadelphia to promote and encourage Minority and Female Owned Businesses; and,

WHEREAS, Economic partly with minority businesses at large has not yet been reached, and based on the progress already demonstrated, cannot be reached within the remaining effective period of this Chapter; and,

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WHEREAS, The Council desires to extend the effective period of this Chapter in order to more fully implement its goals program in the economic development of minority and Female Owned Businesses, and to help eliminate the large amount of unemployment among the City's population — particularly its minority population; and,

WHEREAS, It is additionally desired to create changes in this Chapter in order to implement some of the recommendations of the study on the Minority Business Enterprise Council conducted by Price Waterhouse management consultants in 1996, and to institute other changes in order to promote the effectiveness of this Chapter, now, therefore.

The Council of the City of Philadelphia hereby ordains:

SECTION 1. Chapter 17-500 of The Philadelphia Code is hereby amended to read as follows:

CHAPTER 17-500. Goals for the Participation of Minority and Female-Owned Businesses in City Contracts.

SECTION 17-501. Definitions.

For the purpose of this Chapter, the following terms shall have the following respective definitions:

(1) MINORITY PERSON shall mean a person who is a citizen or lawful permanent resident of the United States and who is:

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* * *

(d) [American Indian or Alaskan Native] *Native American* (a person having origins in any of the original peoples of North America).

* * *

(9) SMALL BUSINESS shall mean a business which is independently owned and operated and which is not dominant in its field of operation as further defined in 13 Code of Federal Regulations, Part 1213, incorporated herein, and made a party by reference. In addition to the foregoing criteria, the Minority Business Enterprise Council, may add additional standards relating to among others, the following: Number of employees, dollar volume of business, and relevant standards as applied by the United States Small Business Administration of the Federal Government.

(10) DISADVANTAGED BUSINESS ENTERPRISE, OR "DBE" shall mean any small business:

(a) which is at least 51 percent (51%) owned by one or mores socially and economically disadvantaged individuals; or

(b) in the case of any publicly owned business, one in which at least 51 percent (51%) of the stock is owned by one or more socially and economically disadvantaged individuals.

Where a business has received more than five million dollars ($5,000,000.00) of contract work with the City under this Chapter, the Minority Business Enterprise Council shall make

a rebuttable presumption that the concern is not a disadvantaged business enterprise, and any previous certification as a Disadvantage Business Enterprise shall be re-evaluated pursuant to regulations to be promulgated by the MBEC.

(11) SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUALS shall mean those individuals who have been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group without regard to their individual qualities, and whose ability to complete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.

(a) In determining who are socially and economically disadvantaged individuals, the Minority Business Enterprise Council may make a rebuttable presumption that all minority persons and all women shall be so classified.

(b) The Minority Business Enterprise Council, in making said determination, shall also consider, among other things the extent of the liquid assets and net worth of such socially disadvantaged individuals.

* * *

SECTION 17-502. Implementation and Applicability.

* * *

(2) This Chapter shall be applied to all types of City contracts and all City agencies. This Chapter shall be effective

for seven (7) years' *until January 1, 1998, unless extended by Ordinance.*

SECTION 17-503. [Minority and Female-Owned Business] *Disadvantaged Business Enterprise* City Contracting Goals.

(1) The following goals for [Minority and Female-Owned Business] *Disadvantaged Business Enterprise* participation shall serve as initial goals for the City of Philadelphia to pursue during the first full Fiscal Year. Prior to the commencement of the first full Fiscal Year, to the extent the staffing and regulations pursuant to Section 17-501 are completed, best efforts shall be made to implement [Minority and Female-owned Business] *Disadvantaged Business Enterprise* participation in City contracts. The goals shall not be construed as absolute upper limits on the amount of City contracts such entities are able to participate in. These goals shall be applicable to all types of City contracts. The goals shall be:

(a) Fifteen percent (15%) City contract participation for Minority Owned Businesses; and,

(b) Ten percent (10%) City contract participation for Female-Owned Businesses.

The above stated percentages relate in the total dollar amount of City contracts during each of the City of Philadelphia's Fiscal years, calculated by examining independently each type of City contract for each agency which lets such contracts. For purposes of calculating the goals for participation in City contracts, a *Disadvantaged,* [b] *Business Enterprise* shall be considered as either a Minority owned or Female-Owned business, but not

both. Subject to the provisions of subsections (2), (3), and (4) in calculating the above percentages only that percentage of contracts awarded under joint venture or sub-contracting arrangements which represent the [Minority or Female-Owned Business] *Disadvantaged Business Enterprise* participation on such contracts shall be included. In no event shall the percentages be considered as having been met by participants in less than all types of City contracts.

(2) For purposes of calculating the percentages in subsection (1), the total dollar amount of a contract shall be counted towards [Minority or Female-Owned Business] *Disadvantaged Business Enterprise* participation, when:

(a) In the case of a prime contract, the prime contractor is a [Minority or Female-Owned Business], *Disadvantaged Business enterprise* so long as:

(i) For contracts up to one million dollars (1,000,000) the [Minority or Female-Owned] *Disadvantaged Business Enterprise* prime contractor shall perform at least fifty percent (50%) of the on-site work with its own force, excluding the cost of materials, goods, supplier and equipment; and,

(ii) For contracts greater than one million dollars ($1,000,000) the [Minority or Female-Owned] *Disadvantaged Business Enterprise* prime contractor shall perform that portion of on-site work with its own work force which demonstrates that it is fiscally and managerially responsible as the prime contractor, and demonstrates at the time the contract is let that it derives substantial benefit from the contract.

(b) In the case of a subcontract, so long as the sub-

contractor is a [Minority or Female-Owned Businesses[*Disadvantaged Business Enterprise* and is substantially involved in all phases of the subcontract, including bidding, planning, staffing and daily management.

(3) For purposes of calculating the percentages in subsection (1), in the case of joint venture, venture partnership and any other joint or multiple firm arrangement:

(a) The total dollar amount of a contract shall be counted towards [Minority or Female-Owned Business] *Disadvantaged Business Enterprise* participation so long as fifty-one percent (51%) of the interests in the arrangement are beneficially owned by [Minority or Female-Owned Businesses] *the Disadvantaged Business Enterprise(s);* or

(b) Where less than fifty-one percent (51%) of the interests in the arrangement are beneficially owned by [Minority or Female-Owned Businesses] *Disadvantaged Business Enterprise(s)* the total dollar amount of the interest of [a Minority or Female-Owned Business] *the Disadvantaged Business Enterprise* participant in a contract shall be counted towards [Minority or Female-Owned Business] *Disadvantaged Business Enterprise* participation so long as:

(i) A [Minority or Female-Owned Business] *Disadvantaged Business Enterprise* can demonstrate at the time the contract is let that it derives substantial benefit from such arrangements;

(ii) The [Minority or Female-Owned Business] *Disadvantaged Business Enterprise* participant is substantially involved in all phases of the contract including bidding, planning, staffing and daily management;

(iii) Such an arrangement is customary; and,

(iv) Such an arrangement is approved by the Minority Business Enterprise Council.

(4) In all cases where subsections (2) and (3) do not apply, the calculation of such percentages shall be based on the dollar amount which represents the extent of participation by a [Minority or Female-Owned Business] *Disadvantaged Business Enterprise* in the contract.

SECTION 17-504. Minority Business Enterprise Council.

(1) To help implement, monitor and enforce the goals of this Chapter there shall be created the Minority Business Enterprise Council ("MBEC") to be a part of the Office of the Director of Finance. The Mayor shall appoint all members of the MBEC, *whose terms of office shall be five (5) years from appointment, and* which shall be composed as follows:

(a) Three (3) members each to be selected from a separate list of at least ten (10) persons, each list to be submitted within fifteen (15) days of the effective date of this Chapter by (i) the Minority Brain Trust, (ii) the Minority Architects and Engineers Alliance and (iii) [the Coalition of Minority Contractors, Inc.] *United Minority Enterprise Associates.* In the event that any person shall appear on more that one list, the Mayor shall have the right to request that a substitute be named. Each such member shall be the Chief Executive Officer of a bona fide Minority Owned Business and a member of the organization from whose list he has been selected;

(b) One (1) member who shall be the Chief Executive Officer of a Female Owned Business;

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(c) Four (4) members selected at the discretion of the Mayor, except that the Director of Finance shall not be selected[;] and, *provided further, that the chairperson of City Council's Committee on Finance, or his designee, shall be one of those selected; and,*

* * *

(2) MBEC's authority and responsibility shall be to:

(a) Devise a certification procedure to assure that businesses taking advantage of this Chapter are legitimate [minority or Female-Owned Businesses] *Disadvantaged Business Enterprises.*

(b) Ascertain, within ninety (90) days of the completion of staffing pursuant to Section 17-504(1) the total number of [Minority or Female-Owned Business] *Disadvantaged Business Enterprise* in the Philadelphia Standard Metropolitan Statistical Area. The MBEC shall maintain a listing of all such businesses for referral by all agencies.

(c) Survey such businesses ascertained in (a) in establish past and current participation levels.

(d) Establish annual reporting requirements for all agencies to document the percentage of contracts which have been let to [Minority and Female-Owned Business] *Disadvantaged Business Enterprise* by the reporting agency.

* * *

(f) Devise, within ninety (90) days from the completion of staffing pursuant to Section 17-504(1), appropriate policies, regulations and procedures for including the participation of [Minority and Female-Owned Business] *Disadvantaged Business Enterprise* in prime contracts with the City. The affirmative programs to be reviewed by the MBEC in this regard shall include, but shall not be limited to the following: (i) including qualified [Minority and Female-Owned Business] *Disadvantaged Business Enterprise* on solicitation lists; (ii) assuring that [Minority or Female-Owned Business] *Disadvantaged Business Enterprise* are solicited whenever they are potential sources; (iii) structuring contract requirements, when economically feasible, to permit maximum participation of [Minority and Female-Owned Business] *Disadvantaged Business Enterprise*; (iv) [investigating the potential of blanket bonding programs] *implementing a bonding program for participants under this Chapter for construction jobs;* (v) [investigating and recommending] *implementing* the use of other legally permissible means of fostering the award of prime contracts to [Minority and Female-Owned Business] *Disadvantaged Business Enterprise, such as joint ventures,* and (vi) investigating and making recommendations concerning the use of the Sheltered Market process.

* * *

(h) Recommend contractual language which provides that compliance with [Minority and Female-Owned Business] *Disadvantaged Business Enterprise* participation requirements is material to the City contract and, further provides for remedies, including but not limited to, termination of the contract in the event of non-compliance, and *further provides that prime contractors will agree to the assignment of the proceeds of their*

subcontracts with Disadvantaged Business Enterprises, by the Disadvantaged Business Enterprises, to financial institutions providing working capital financing for the subproject, when requested by such Disadvantaged Business Enterprises and financial institutions, and pursuant to equitable regulations developed by the MBEC.

* * *

SECTION 17-505. Exemptions and Waivers.

(1) Individual Contract Exemptions

The MBEC, on its own initiative or at the request of the affected agency, may recommend that an individual contract or contract "package" (i.e., related contracts being bid or awarded simultaneously for the same project or improvement) be made wholly or partially exempt from [Minority and Female-Owned Business] *Disadvantaged Business Enterprise* contracting goals prior to the advertisement for bids or solicitation of proposals, whenever there has been a determination, reduced to writing and based on the best information available at the time of the determination, that there [in] *are* an insufficient number of [Minority and Female-Owned Business] *Disadvantaged Business Enterprise* within the Philadelphia Standard Metropolitan Statistical Area to ensure adequate competition and an expectation of reasonable prices on bids or proposals solicited for the individual contract or contract "package" in question.

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(2) Class Exemptions

(a) Creation of exempt classes of contracts

The MBEC, on its own initiative or at the request of the affected agency, may recommend that an entire class of contracts established pursuant in Section 17-503 be made exempt from [Minority and Female-Owned Business] *Disadvantaged Business Enterprise* City contracting goals, whenever there has been a determination reduced to writing and based on the best information available at the time of the determination, that there is an insufficient number of qualified [Minority or Female-Owned Business] *Disadvantaged Business Enterprise* in the Philadelphia Standard Metropolitan Statistical Area to ensure adequate competition and an expectation of reasonable prices on bids or proposals within that class.

(b) Limitation on class exemption

Any such class exemption shall not be created for a period of more than one year at a time.

(3) Waivers

Where a particular contract requires a contractor to meet a goal established pursuant to this Chapter, the contractor shall have the right to request a waiver from such requirements. The MBEC shall recommend that the waiver be granted where the contractor demonstrates that there has been made a good faith effort to comply with the goals for [Minority or Female-Owned Business] *Disadvantaged Business Enterprise* participation.

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SECTION 17-506. Enforcement

The MBEC shall make such findings, recommendations and proposals to the Director of Finance as are necessary and appropriate to enforce this Chapter. If, as a result of its monitoring activities, the MBEC determines that the goals set forth in Section 17-503 and those policies devised by the MBEC pursuant to Section 17-504(2)(1) are not being met by any agency, the MBEC may recommend any or all of the following actions:

(a) In the event that the MBEC determines that a person under contract with the City has failed to comply with contractual provisions requiring [Minority or Female-Owned Business] *Disadvantaged Business Enterprise* participation, the MBEC may recommend that the City exercise its legal remedies, including, if appropriate, the termination of the contract involved.

(b) In the event that the MBEC determines that an agency is entering into contracts in a manner or at a rate which is unlikely to achieve the [Minority or Female-Owned Business] *Disadvantaged Business Enterprise* participation goals of this Chapter, the MBEC may request that the agency furnish to it a compliance plan setting forth in detail how contracts are proposed to be awarded prospectively to achieve the goals within the then current fiscal year.

(c) If the MBEC concludes that a compliance plan submitted under subsection (b) above is unlikely to produce the [Minority or Female-Owned Business] *Disadvantaged Business Enterprise* participation goals within the then current fiscal year, the MBEC may recommend that the agency revise

its plan to provide additional opportunities for [Minority and Female-Owned Business] *Disadvantaged Business Enterprise* participation. Such recommended revisions may include, but shall not be limited to the following:

(1) Assurances of stronger and better focused solicitation efforts to obtain more [Minority and Female-Owned Business] *Disadvantaged Business Enterprise* as potential sources of supply;

(2) Division of job or project requirements, when economically feasible, into tasks or quantities to permit participation of [Minority and Female-Owned Business] *Disadvantaged Business Enterprise* ;

(3) Elimination of extended experience or capitalization requirements, when programatically feasible, to permit participation of [Minority and Female-Owned Business] *Disadvantaged Business Enterprise*;

(4) Identification of specific proposed contracts as particularly attractive or appropriate for participation by [Minority or Female-Owned Business] *Disadvantaged Business Enterprise*, such identification to result from and be coupled with the efforts of subsections (1) through (3) above;

(5) Implementation of those regulations established pursuant to Section 17-504(2)(g) for the use of the Sheltered Market.

(d) In the event that a prime contractor which has contracted with the City has received a payment or payments from the City for work performed, he must deliver to his

subcontracting Disadvantaged Business Enterprise his/her proportionate share of the payment for their work performed within five (5) business days, and transmit a sworn affidavit attesting there to the MBEC, or produce reasons satisfactory to the MBEC for the withholding of such funds, or be held in non-compliance with his contract by the MBEC. In the event of a determination of non-compliance, the MBEC shall then recommend that the City exercise its legal remedies, including, if appropriate, the termination of the contract involved.

(1) When the City has paid at least eighty percent (80%) of the contract price to the prime contractor, the prime contractor shall be required to return to the MBEC a sworn affidavit attesting to the amounts of the contract proceeds which have been paid to the subcontracting Disadvantaged Business Enterprise. If such affidavit is not so returned, the Director of Finance shall withhold further payment to said contractor.

(e) Where one or more Disadvantaged Business Enterprises is listed as a participant in the bid of a prospective contractor with the City, and one or more of the contract's performance when such bidder secures the said City contract, the successful bidder shall be required to demonstrate to the satisfaction of the MBEC why such Disadvantaged Business Enterprise was not used on the contract, or be held in non-compliance with his contract by the MBEC. In the event of such determination of non-compliance, the MBEC shall recommend that the City exercise its legal remedies, including, if appropriate, the termination of the contract involved.

* * *

SECTION 2. This Ordinance shall be effective immediately.

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AN ORDINANCE

Explanation:
[Brackets] indicate matter deleted.
Italics indicate new matter added.

Amending Chapter 17-500 of The Philadelphia Code, entitled "Goals For The Participation of Minority and Female Owned Businesses in City Contracts," by making certain additions and establishing City contract goals for handicapped persons.

WHEREAS, Individuals with physical or mental disabilities are customarily denied access to employment and business opportunities without regard to their capabilities; and,

WHEREAS, Such individuals are often discouraged from attaining a quality education; and,

WHEREAS, It is difficult for physically or mentally impaired persons, despite their qualifications, to overcome barriers to professional advancement; and,

WHEREAS, Establishment of a City contract participation goal will encourage handicapped persons to develop businesses and participate in the free enterprise system; now, therefore,

The Council of the City of Philadelphia hereby ordains:

SECTION 1. Chapter 17-500 of the Philadelphia Code, entitled "Goals For The Participation of Minority and Female Owned Businesses in City Contracts," is hereby amended as follows:

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CHAPTER 17-500. GOALS FOR THE PARTICIPATION OF MINORITY [AND], FEMALE *AND HANDICAPPED* OWNED BUSINESSES IN CITY CONTRACTS.

§ 17-501. Definitions.

For the purpose of this Chapter, the following terms shall have the following respective definitions:

* * *

(5) Sheltered market shall mean a City-wide procurement system whereby certain contracts are selected and specifically set aside for Minority [or], Female *or Handicapped* Owned Businesses or [both] *all such businesses* on a competitive bid or negotiated basis.

* * *

(11) Socially and Economically Disadvantaged Individuals shall mean those individuals who have *either* been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group *or differential treatment because of their handicap* without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.

(a) In determining who are socially and economically disadvantaged individuals, the Minority Business Enterprise Council may make a reputable presumption that all minority

persons [and], all women *and all handicapped persons* shall be so classified.

* * *

(12) Handicapped Person shall mean a person who has a physical or mental impairment which substantially limits one or more of his or her major life activities or has a record of such an impairment. Major life activities shall mean functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

(13) Handicapped Owned Business shall mean:

(a) a sole proprietorship where the sole proprietor is a handicapped person; or

(b) a business corporation where fifty-one percent (51%) of the interests in such corporation are beneficially owned by handicapped persons and handicapped persons occupy the majority of management and Board positions and control all decisions concerning the corporation; or

(c) a partnership where fifty-one percent (51%) of the partnership interests in such partnership are beneficially owned by handicapped persons and handicapped persons occupy the majority of management and partnership positions and control all decisions concerning the partnership; or

(d) any other business or professional entity where fifty-one percent (51%) of the interests are beneficially owned by handicapped persons and handicapped persons occupy the majority of management and Board positions and control all decisions concerning the entity.

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* * *

§ 17-503. Disadvantaged Business Enterprise City Contracting Goals.

(1) The following goals for Disadvantaged Business Enterprise participation shall serve as initial goals for the City of Philadelphia to pursue during the first full Fiscal Year. Prior to the commencement of the first full Fiscal Year, to the extent the staffing and regulations pursuant to Section 17-504 are completed, best efforts shall be made to implement Disadvantaged Business Enterprise participation in City contracts. The goals shall not be construed as absolute upper limits on the amount of City contracts such entities are able to participate in. These goals shall be applicable to all types of City contracts. The goals shall be:

* * *

(b) Ten percent (10%) City contract participation for Female-Owned Business[.]; *and,*

(c) Two percent (2%) City contract participation for Handicapped Owned Businesses.

The above stated percentages relate to the total dollar amount of City contracts during each of the city of Philadelphia's Fiscal Years, calculated by examining independently each type of City contract for each agency which lets such contracts. For purposes of calculating the goals for participation in City contracts, a Disadvantaged Business Enterprise shall be considered as either a Minority Owned [or], Female-Owned *or Handicapped Owned* business, but not [both] *more than one.* Subject to the provisions

of subsections (2), (3), and (4) in calculating the above percentages only that percentage of contracts awarded under joint venture or subcontracting arrangements which represents the Disadvantaged Business Enterprise participation on such contracts shall be included. In no event shall the percentages be considered as having been met by participants in less than all types of City Contracts.

* * *

§ 17-504. Minority Business Enterprise Council.

* * *

(2) MBEC's authority and responsibility shall be to:

* * *

(1) Issue a written annual report indicating the progress made toward achieving the goals set out above. Said report shall include, but not be limited to a summary of City contracts let during the relevant periods, the extent and percentage of Minority [and], Female *and Handicapped* Owned Business participation, and recommendations as to the appropriate future goals. The annual report shall be available for public review.

* * *

Section 2. This Ordinance shall take effect within three (3) months of the date of final approval.

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REGULATIONS

TO

CHAPTER 17-500 OF THE PHILADELPHIA CODE

"GOALS FOR THE PARTICIPATION OF MINORITY AND FEMALE OWNED BUSINESSES IN CITY CONTRACTS"

August 12, 1983

As amended, September 28, 1984; October 17, 1984; May 8, 1986, February 11, 1988.

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[1] PART 1: GENERAL

§ 1.1 *PURPOSE*

A. The purpose of Chapter 17-500 of The Philadelphia Code entitled "Goals for the Participation of Minority and Female Owned Businesses in City Contracts" and these Regulations is to carry out the City of Philadelphia's policy to promote and encourage economic development of Minority and Female Owned Disadvantaged Business Enterprises ("M/W-DBEs") and their participation in City contracts as prime contractors and subcontractors.

B. These regulations contain policies and procedures necessary for the implementation of Chapter 17-500.

§ 1.2 *APPLICABILITY*

These Regulations apply to all types of City contracts and all city agencies, as these terms are defined in Chapter 17-500.

§ 1.3 *DEFINITIONS*

A. Agency: as defined in Chapter 17-500, any City of Philadelphia office, department, independent board or independent commission created by the Home Rule Charter and shall include the Council of the City of Philadelphia.

B. COMMODITY CODE: a classification by business type accepted by the MBEC on the basis of information available at the time of certification or as subsequently approved by the MBEC, identifying the nature of the work performed, services rendered or material supplied over which the minority

or female owner has demonstrated bona fide ownership and control.

C. Compliance: a contractor or subcontractor who has acted in accordance with the requirements of Chapter 17-500 and these regulations shall be in compliance.

D. Contract: as defined in Chapter 17-500, all City contracts, whether competitively bid or negotiated, according to the following classes: (a) [2] vending, to include material, equipment, services and supplies; (b) construction; and (c) personal and professional services.

E. Contractor: a person who is a party or a potential party to a contract with a City agency.

F. Day: unless otherwise specified, a business day, exclusive of any day observed as a legal holiday by the City of Philadelphia.

G. DISADVANTAGED BUSINESS ENTERPRISE, OR "DBE" shall mean any small female or minority owned business as defined in Section 1.3 I and L herein, provided that: where a business has received more than five million dollars ($5,000,000.00) of contract work with the City under this Chapter, dating from July 1, 1985, the Minority Business Enterprise Council shall make a rebuttable presumption that the concern is not a disadvantaged business enterprise, and any previous certification as a Disadvantaged Business Enterprise shall be reevaluated pursuant to regulations to be promulgated by the MBEC.

H. Elligible Aggregate Amount: The aggregate amount of

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City contracts in the following classes: vending contracts, construction contracts and personal and professional services contracts. Eligible Aggregate Amount does not include the amount of any contracts for concessions, leases, utilities, payment of subsidies or contracts in connection with grants or matching funds necessary to obtain public or private grants or assistance. The MBEC may recommend to the Director of Finance for his/her approval, other contracts which are to be either included in or excluded from the Eligible Aggregate Amount as contemplated by Chapter 17-500.

I. Female Owned Business: as defined in Chapter 17-500, a small, for-profit business which is:

(1) a sole proprietorship where the sole proprietor is a socially and economically disadvantaged female and the female controls all decision [3] concerning the sole proprietorship including, but not limited to, day-to-day decisions on matters of operation;

(2) a business corporation where fifty-one percent (51%) of the interests in such corporation is beneficially owned by socially and economically disadvantaged females and socially and economically disadvantaged females occupy the majority of management and Board positions and control all decisions concerning the corporation including, but not limited to, day-to-day decisions on matters of operation;

(3) a partnership where fifty-one percent (51%) of the partnership interest in such partnership is owned by socially and economically disadvantaged females and socially and economically disadvantaged females occupy the majority of management and partnership positions and control all decisions

concerning the entity including, but not limited to, day-to-day decisions on matters of operation; or

(4) any other business or professional entity where fifty-one percent (51%) of the interests is owned by socially and economically disadvantaged females and socially and economically disadvantaged females occupy the majority of management and Board positions and control all decisions concerning the entity including, but not limited to, day-to-day decisions on matters of operation.

J. Goals Program: The program established by Chapter 17-500 for Minority and Female Owned Disadvantaged Business Enterprises, specifically participation goals of:

(1) Fifteen percent (15%) of the eligible aggregate amount for Minority Owned Disadvantaged Business Enterprises; and

(2) Ten percent (10%) of the eligible aggregate amount for Female Owned Disadvantaged Business Enterprises.

[4] K. Minority Business Enterprise Council, MBEC: a nine member group created pursuant to Section 17-504 of The Philadelphia Code as a part of the Office of the Director of Finance to help implement, monitor and enforce the goals of Chapter 17-500.

L. Minority Owned Business: as defined by Chapter 17-500, a small, for-profit business which is:

(1) a sole proprietorship where the sole proprietor is a socially and economically disadvantaged minority and the

minority controls all decisions concerning the sole proprietorship including, but not limited to, day-to-day decisions on matters of operation;

(2) a business corporation where fifty-one percent (51%) of the interests in such corporation is beneficially owned by socially and economically disadvantaged minority persons and socially and economically disadvantaged minority persons occupy the majority of management and Board positions and control all decisions concerning the corporation including, but not limited to, day-to-day decisions on matters of operation;

(3) a partnership where fifty-one percent (51%) of the partnership interests in such partnership is beneficially owned by socially and economically disadvantaged minority persons and socially and economically disadvantaged minority persons occupy the majority of management and partnership positions and control all decisions concerning the partnership including, but not limited to, day-to-day decisions on matters of operation; or

(4) any other business or professional entity where fifty-one percent (51%) of the interests is beneficially owned by socially and economically disadvantaged minority persons and socially and economically disadvantaged minority persons occupy the majority of management and Board positions and control all decisions concerning the entity including, but not limited to, day-to-day decisions on matters of operation.

[5] M. Minority Person: as defined by Chapter 17-500, a person who is a citizen or lawful permanent resident of the United States and who is:

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(1) Black (a person having origins in any of the black racial groups in Africa);

(2) Hispanic (a person of Spanish or Portuguese culture with origins in Mexico, South or Central America, or the Caribbean Islands, regardless of race);

(3) Asian American (a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent or the Pacific Islands); or

(4) Native American (a person having origins in any of the original peoples of North America).

N. M/W-DBE: a minority and/or female owned disadvantaged business enterprise.

O. Person: as defined by Chapter 17-500, a corporation, partnership or association, or any combination thereof, as well as a natural person.

P. Qualified Contractor: A contractor with the City which is a public corporation, authority, quasi-public agency or a non-profit corporation which is funded in whole or in part by the City.

Q. Sheltered Market: as defined by Chapter 17-500, a City-wide procurement system whereby certain contracts are selected and specifically set aside for Minority or Female Owned Disadvantaged Business Enterprises or both on a competitive bid basis.

R. Small Business: a business which is independently

owned and operated and which is not dominant in its field of operation as further defined by the Small Business Size Regulations, adopted by the U.S. Small Business Administration and published in the U.S. Code of Federal Regulations, including [6] the industry size standards set forth in the tables contained therein, which regulations are incorporated herein and made a part by reference. The term Small Business shall also apply to a business which meets any additional criteria which the Minority Business Enterprise Council may in its discretion adopt upon approval by the Director of Finance, relating to, among others, the following criteria: number of employees, dollar volume of business and other standards relevant to business size.

S. Socially and Economically Disadvantaged Individuals: Individuals who have been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially and economically disadvantaged. The MBEC may make a rebuttable presumption that minority persons and women are socially and economically disadvantaged.

T. Voluntary Compliance Plan: a goals program adopted by a Qualified Contractor that provides that the Qualified Contractor shall, when it contracts with third parties, contract at least 15% of its total contract dollars to minority owned disadvantaged business enterprises certified by the City and at least 10% to female owned disadvantaged business enterprises certified by the City.

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§ 1.4 *SEVERABILITY*

If any provision of Chapter 17-500, these regulations or the application thereof is declared invalid, the remainder of Chapter 17-500, these regulations and the application thereof to other persons or circumstances shall not be affected by such declaration and shall remain in full force and effect.

[7] PART 2. MINORITY BUSINESS ENTERPRISE COUNCIL: PROCEDURES

§ 2.1 *ESTABLISHMENT*

A. The powers and duties created by Chapter 17-500 and these Regulations shall be vested in and exercised by the Office of the Director of Finance. The MBEC shall be a part of the Office of the Director of Finance. The MBEC shall submit all findings, recommendations, proposals and other actions of the MBEC to the Director of Finance for approval and implementation. The Director of Finance may designate an appropriate official or officials within his/her office and delegate to such person certain powers and duties vested in him/her pursuant to Chapter 17-500 and these Regulations in a manner that is consistent with the Philadelphia Home Rule Chapter, Section 3-701. If the Director of Finance determines not to or fails to implement or respond to an MBEC action, the MBEC may submit a written request for review to the Mayor, who shall make a final determination upon such request, except that all appeals from grievances pursuant to Part 9 of these Regulations shall be decided by the Director of Finance whose decision shall be final.

B. The Mayor shall appoint the members of and make

available administrative staff and support services for the MBEC in accordance with Chapter 17-500, Section 504(1). The MBEC may delegate any and all such duties and responsibilities under Chapter 17-500 and these regulations to its staff director to be carried out pursuant to established guidelines and standards; provided, however, that all recommendations, findings and proposals made in accordance with these Regulations shall be deemed to be made by the MBEC.

C. All members of the MBEC shall serve at the pleasure of the Mayor. The Mayor shall appoint a Chairperson and a Vice Chairperson. The Chairperson shall preside at the meetings of the MBEC; in the absence of the Chairperson, the Vice Chairperson shall preside.

[8] D. A member shall resign from the MBEC by giving written notice to the Chairperson, who will forward the notice to the Director of Finance and the Mayor.

E. Except as otherwise provided for in Part 3, Grievances, herein, the MBEC may delegate any of its responsibilities and duties to a panel consisting of not less than two MBEC members. A panel which is formed pursuant to Part 9 of these Regulations shall consist of not less than three MBEC members. The panel shall submit its recommendation to the MBEC for final approval, modification or reversal in accordance with the procedures provided in these Regulations for valid findings, recommendations, proposals or other actions by the MBEC.

F. In the event of a vacancy on the MBEC, the Mayor shall make an appointment in the same manner in which the previous member was appointed in accordance with Chapter 17-500, Section 504(1).

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§ 2.2 *MEETINGS AND VOTING*

A. The MBEC shall meet at such times and places as the members shall determine. Unless other notice is given, meetings shall be held at least once a month. Written notice of the meetings specifying the place, date and time shall be given to each member at least five (5) calendar days prior to the meeting.

B. Special meetings may be called at any time by the Chairperson, or by the Mayor, the Director of Finance, or any five members of the MBEC upon written request to the Chairperson. Upon receipt of such request, it shall be the duty of the Chairperson to fix the time and place of the meeting, which shall be held not more than five (5) days thereafter. In the event that the Chairperson fails to call a special meeting as provided for herein, the Secretary shall call such a special meeting within five (5) days of a request for a special meeting.

[9] Five (5) calendar days written notice of a special meeting shall be given to each member.

C. A majority of the MBEC shall be necessary to constitute a quorum at all meetings. The vote of a majority of the members present shall be required for a valid finding, recommendation, proposal or other action of the MBEC; provided, however, that the number of members present at the time of such vote shall not be less than a quorum. Each member shall have one vote.

D. The MBEC shall conduct its meetings in accordance with the provisions of the Sunshine Act, Act of July 3, 1986, P.L. 388, No. 84.

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§ 2.3 *STANDARDS OF CONDUCT AND CONFLICTS OF INTEREST*

The members of the MBEC shall be governed by the Philadelphia Code. Chapter 20-600, entitled "Standards of Conduct and Ethics".

[10] PART 3. MINORITY BUSINESS ENTERPRISES COUNCIL: RESPONSIBILITIES

§ 3.1 *SOLICITATION LISTS*

The MBEC shall ascertain, with the assistance of the Procurement Commissioner of his/her designee, the identity of minority and female owned disadvantaged business enterprises ("M/W-DBEs"), within the Philadelphia Standard Metropolitan Statistical Area.

§ 3.2 *MBEC DIRECTORY OF CERTIFIED FIRMS*

A. After a business has been certified pursuant to Part 4, it shall be designated "Certified" in the MBEC Directory of Certified Firms ("Directory"). Such designation shall assist the MBEC and City agencies in applying the goals program only towards certified M/W-DBEs.

B. The Directory shall classify each certified business according to commodity codes. This Directory shall be distributed to all City agencies and shall be available to the public.

C. The MBEC shall update the Directory on a quarterly basis. The updates shall be distributed to all City agencies and shall be available to the public.

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§ 3.3 *RECORDKEEPING ASSISTANCE*

A. The MBEC shall develop with each agency a uniform record keeping system that reflects each agency's implementation of Chapter 17-500 and records such information as *inter alia,* contract awards to M/W-DBEs, the progress made by prime contractors in achieving M/W-DBE subcontract goals and other contract participation efforts.

§ 3.4 *ANNUAL REPORT*

A. Within forty-five (45) calendar days of receipt of the annual reports prepared by the agencies pursuant to 35.5 herein, the MBEC shall issue a written annual report.

[11] B. The report shall include, but not be limited to, the following information:

(1) A summary of City contracts let during that fiscal year specifying the extent and percentage of M/W-DBE participation as reflected in the agencies' reports;

(2) A survey comparing past and current City contract participation levels of certified businesses listed in the Directory indicating the progress made toward achieving the goals;

(3) Recommendations as to appropriate future goals for M/W-DBEs.

§ 3.5 *MINORITY AND FEMALE OWNED DISADVANTAGED BUSINESS ENTERPRISE ASSISTANCE*

A. The MBEC may recommend to the Director of Finance

for his/her approval programs designed to implement the goals programs. Such programs may include:

(1) The provision of training opportunities and seminars for City personnel involved in the implementation of the goal's program. Such training and seminars shall be designed to assist such personnel in endeavors to increase M/W-DBE participation in all types of City contracts;

(2) The provision of technical assistance and workshops to assist M/W-DBEs on matters relating to future contracting opportunities and on the appropriate procedures for participating in all types of City contracts;

(3) Implementation of a bonding program for construction jobs;

(4) Such other programs that the MBEC recommends as necessary or desirable to effectively implement the goals program.

§ 3.6 *AMENDMENTS*

The MBEC may, from time to time, recommend such amendments to these Regulations as may be necessary for the implementation of Chapter 17-500. Any amendments to these Regulations shall become effective upon approval of the [12] Director of Finance and upon compliance with the procedures of the Philadelphia Home Rule Charter, Section 8-407, entitled "Regulations."

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§ 3.7 *ENFORCEMENT*

A. When the MBEC makes a recommendation that any person has failed to comply with contract requirements established pursuant to Chapter 17-500 and these Regulations, the MBEC shall notify the Director of Finance and, when criminal activity is suspected, the appropriate City, State and Federal authorities. The MBEC may recommend to the Director of Finance remedies, including but not limited to: withholding of payments; debatement; decertification; termination of the contract involved.

B. When the Director of Finance determines that any person has failed to comply with these contract requirements, the City may, in addition to any sanctions provided under the contract or recommended by the MBEC, terminate the contract and/or resort to any remedies which are available at law or in equity.

[13] PART 4. CERTIFICATION OF STATUS AS A MINORITY OR FEMALE OWNED DISADVANTAGED BUSINESS ENTERPRISE

§ 4.1 *CERTIFICATION*

A. To ensure that only businesses which are owned and controlled in both form and substance by socially and economically disadvantaged minorities or females are counted towards the goals requirements set forth in Chapter 17-500, any minority or female owned disadvantaged business enterprise ("M/W-DBE") must be certified by the MBEC as a M/W-DBE in accordance with the procedures set forth herein in order to be counted towards the goals.

B. Any business that wishes to be certified as a M/W-DBE shall apply to the MBEC for such certification and shall complete all forms and supply all documentation required by the MBEC for such application. In the event a business is certified, it shall be an on-going obligation of the business to provide, upon request, all information necessary to assist the MBEC in assessing the continuing validity of the business' status as a bona fide M/W-DBE.

C. Upon timely receipt of all requested information, the MBEC will evaluate the submitted information to determine whether the applicant meets the definition of a minority or female owned disadvantaged business enterprise as defined in § 1.3 of these Regulations. The MBEC may request any additional information from the applicant that it deems necessary to make a certification recommendation. Prior to making a certification recommendation, the MBEC may, in its discretion, request an interview with the applicant at its place of business and/or request an interview with the applicant at the MBEC staff office. The MBEC may require the applicant to bring any additional information or documentation to such interview that it deems necessary to establish such [14] applicant as a M/W-DBE. The MBEC may conduct an on-site inspection of the applicant's business premises and any warehouse or operational sites. Failure of an applicant to comply with requests for information, documentation or to permit an inspection shall result in a determination of certification status bases on the information supplied or termination of the application for certification.

D. Upon completion of its evaluation, the MBEC shall make a certification recommendation to the Director of Finance within ninety (90) days, unless an extension is authorized by the MBEC. Thereafter, the Director of Finance shall make a

certification determination and notify the business of such determination.

E. Upon receipt of certification, a business shall be designated as "Certified" in the MBEC Directory of Certified Firms described in § 3.2 of the Regulations. Once certified, a business shall notify the MBEC, in writing, if there is a change in the business that affects its status as a M/W-DBE, including changes in ownership, control, management, size, or modification in the provision of services or products previously listed in the Directory. No change shall be accepted for purposes of modifying the certification, including without limitation, the designated commodity code(s) until written approval is received from the MBEC.

F. If a business is denied certification, the Director of Finance shall notify the business in writing of the reasons for such denial. A business that is denied certification may not re-apply for certification for a period of twelve (12) months from the date of the Director of Finance's denial.

[15] G. The MBEC may recommend certification of a M/W-DBE that has been previously certified pursuant to another program, including another goals program or such other program concerned with minority or female owned disadvantaged businesses, taking into consideration the extent to which the program contains standards that are similar to or different from the standards established pursuant to Chapter 17-500.

H. Recommendations regarding certification pursuant to this Part 4 shall relate to counting toward goals for participation by bona fide M/W-DBEs. Certification pursuant to these Regulations relates solely to the ownership, size and control of the certified business as determined in accordance with the

standards set forth in § 4.2 below and not to its ability to perform work on a specific contract. The City through its agencies reserves the right to evaluate a bidder or contractor's ability to satisfy financial, technical or other criteria separate and apart from the certification process provided for in these Regulations.

§ 4.2 *STANDARDS FOR CERTIFICATION*

A. In order to be certified as a M/W-DBE the business must satisfy the following criteria: fifty-one percent (51%) of the interests in the business must be beneficially owned by minorities or females who are both socially and economically disadvantaged; minorities or females who are both socially and economically disadvantaged must occupy the majority of management and Board positions and control all decisions concerning the business including but not limited to, day-to-day decisions on matters of operation; and the business must be a small business. The MBEC shall use the standards below in evaluating the information supplied by the applicant pursuant to § 4.1 herein to determine whether a business shall be recommended to be certified as a M/W-DBE. These standards are to be used as guidelines rather than absolute requirements.

[16] (1) Ownership and Control

(a) An eligible M/W-DBE under this program shall be an independent business. The ownership and control by socially and economically disadvantaged minorities or females shall be real, substantial, and continuing and shall go beyond the pro forma ownership of the business as reflected in its ownership documents. The socially and economically disadvantaged minority or female owners shall enjoy the customary incidents of ownership and shall share in the risks and profits commensurate with their ownership interests, as demonstrated

by an examination of the substance rather than form of arrangements. Recognition of the business as a separate entity for tax or corporate purposes is not necessarily sufficient for recognition as a M/W-DBE. In determining whether a potential M/W-DBE is an independent business, the MBEC shall consider all relevant factors, including the date the business was established, the adequacy of its resources to perform work under City contracts, and the degree to which financial, equipment leasing, and other relationships with non-M/W-DBE firms vary from industry practice.

(b) the socially and economically disadvantaged minority or female owners shall also possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as major decisions on matters of management, policy and operations. The firm shall not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged minority or female owners. There shall be no restrictions, for example, through bylaw provisions, partnership agreements, or charter requirements for cumulative voting rights or otherwise that prevent the socially and economically disadvantaged minority or female owners from making a business decision of the firm, without the cooperation or vote of any owner who is not a socially and economically disadvantaged minority or female.

[17] (c) If the owners of the firm who are not socially and economically disadvantaged minorities or females are disproportionately responsible for the operation of the firm, then the firm is not controlled by socially and economically disadvantaged minorities or females and shall not be considered a minority or female owned disadvantaged business enterprise within the meaning of these Regulations.

(d) No securities held in trust or by any guardian for a minor shall be considered as held by a minority or female in determining the ownership and/or control of a corporation, if such trust or guardian arrangement removes, diminishes or otherwise undermines ownership and control by the minority or female disadvantaged business owner.

(e) The contributions of capital or expertise by the socially and economically disadvantaged minority or female owners to acquire their interests in the firm shall be real and substantial. Examples of insufficient contributions include: a promise to contribute capital; a note payable to the firm or its owners which deviates from customary business practice; or the mere participation as an employee.

(f) In addition to the above standards, the MBEC shall give careful scrutiny to the following circumstances in determining eligibility under these Regulations:

(.1) Newly formed firms and firms whose ownership and/or control have changed shall be closely scrutinized to determine the reasons for the formation of or change in the firm.

(.2) A previous and/or continuing employer/employee relationship shall be carefully reviewed to ensure that the employee-owner has the management responsibilities and capabilities discussed in this section.

(.3) Where the actual management of the firm is contracted out to individuals other than the owner, the firm shall be closely scrutinized [18] to determine whether the M/W-DBE owner has ultimate control over the management

including, but not limited to, the power to hire and fire the managers.

(.4) Any relationship or arrangement between a M/W-DBE and a non-M/W-DBE shall be carefully reviewed to determine if the relationship/arrangement conflicts with the ownership and control requirements of this Section. Examples of such relationships or arrangements include the following:

i. Facilities (offices, production space, telephones, utilities etc.) are shared with former employers, relatives or prime contractors with whom the M/W-DBE plans to subcontract;

ii. Personnel, contrary to customary business practice, are temporarily obtained from a non-M/W-DBE for a City contract and return to such firm at the conclusion of the contract;

iii. Equipment is not owned or competitively leased by the M/W-DBE;

iv. Capital is provided by or traceable to prime contractors with whom the M/W-DBE is subcontracting contrary to customary business practice.

(g) A joint venture will be eligible to compete as a M/W-DBE under this program if the M/W-DBE partner of the joint venture meets the standards of an eligible M/W-DBE set forth above, and the M/W-DBE partner shares in the ownership, control and management responsibilities, the risks and profits of the joint venture and the M/W-DBE partner is responsible for a clearly defined portion of the work to be performed.

(.1) Where fifty-one percent (51%) of the interests in the joint venture is beneficially owned by the M/W-DBE partner, the joint venture is eligible for certification as a minority or female owned disadvantaged business enterprise and will be listed in the MBEC Directory of Certified [19] Firms. The total dollar amount of a contract with a certified M/W-DBE joint venture will be counted towards the goals.

(.2) Where less than fifty-one percent (51%) of the interests in the joint venture is beneficially owned by the M/W-DBE partner, the joint venture is not eligible for certification as a minority or female owned disadvantaged business enterprise. The joint venture's participation may be counted towards the goals only to the extent of the M/W-DBE partner's ownership interest in the joint venture. Such arrangements must be approved by the MBEC in accordance with § 5.5A(4)(b) of these Regulations.

(2) Small Business Size Determination

An eligible M/W-DBE under this program shall be a small business, i.e., a business which is independently owned and operated and which is not dominant in its field of operation. A business is not dominant in its field of operation when it does not, in comparison with similar businesses, exercise a controlling or major influence in its field of business activity. The MBEC in evaluating a business' size may consider the number of employees, dollar volume of business and other relevant factors as applied by the United States Small Business Administration (SBA), including utilization of the industry size standards as set forth in tables adopted by the SBA for determining a business' eligibility for federal programs.

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(3) Determination of Social and Economic Disadvantage

(a) A minority or female individual is both socially and economically disadvantaged if his or her disadvantaged status is a result of race, gender or national origin. The MBEC may make a rebuttable presumption that all minority persons and all females are socially and economically disadvantaged.

(b) In evaluating whether an applicant is socially and economically disadvantaged, the MBEC shall consider the liquid assets and net worth of [20] the applicant and those firms with which the applicant is affiliated. The MBEC shall compare the applicant and its firm to business owners who are not socially and economically disadvantaged and the firms owned by such individuals.

(c) An applicant may present to the MBEC any relevant evidence in support of its claim of social and economic disadvantage including but not limited to:

(.1) Personal statements by the applicant or third parties, relating to the applicant's disadvantaged status and demonstrating an actual link between the applicant's status and the impairment of educational, employment and business opportunities;

(.2) Copies of administrative or judicial findings of discrimination experienced by the applicant;

(.3) Evidence of the applicant's long-standing, continuing identification as a member of a socially and economically disadvantaged group.

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§ 4.3 *PROGRAM ELIGIBILITY THRESHOLD*

The MBEC shall make a rebuttable presumption that a M/W-DBE is no longer disadvantaged when it has received, whether as a prime contractor or sub-contractor or both, more than $5,000,000 of contract work with the City pursuant to Chapter 17-500, dating such work from July 1, 1985. If the M/W-DBE wishes to remain in the program, it shall promptly submit such information as the MBEC may require for reevaluation as a M/W-DBE pursuant to this Part 4. After review of the information, the MBEC shall make a recommendation to the Director of Finance concerning the business' program eligibility. Thereafter, the Director of Finance shall make a final determination and notify the business of such determination in writing. In the event the Director of Finance determines that the business is not eligible, the business or any affiliate or newly formed entity which is substantially identical to the [21] ineligible business shall not be permitted to reapply for future participation in the Program.

§ 4.4 *DE-CERTIFICATION*

A. A minority or female owned disadvantaged business enterprise may be de-certified for reasons which include:

(1) The business entity has changed to the extent that the business is no longer owned and controlled by socially and economically disadvantaged minorities or females as required by Chapter 17-500;

(2) The business is no longer a small business;

(3) The certified firm is engaging in a business that is

different in nature and character from the type of business such firm claimed to engaged in during the original certification process, such that the original basis for which a finding of ownership and control was determined is inapplicable to the firm's present business;

(4) The business has been de-certified under a similar goals program;

(5) Untrue or misleading information was provided on behalf of the business to the MBEC during the original certification process or the recertification process;

(6) The business has repeatedly been found to not be performing a commercially acceptable function, as defined in § 5.7C of these Regulations;

(7) The business or its owners have engaged in abusive conduct such as fraud, collusion, violation of these Regulations or other actions of a similar nature intended to undermine the M/W-DBE program goals; and

(8) Such other reasons that the MBEC determines are a reasonable indication that the M/W-DBE is not owned and controlled by socially and economically disadvantaged minorities or females.

B. After review of the documentation concerning de-certification the MBEC shall make a recommendation promptly to the Director of Finance or his/her [22] designee concerning de-certification. Thereafter, the Director of Finance or his/her designee shall determine whether the M/W-DBE should be de-certified and shall notify the business of such decision in writing.

A notice de-certifying a business shall specify the reasons supporting such decision. A de-certified business may not re-apply for certification for a period of time to be determined by the Director of Finance, after consideration of the MBEC's recommendation, but in no event longer than a period of three years from the date of the Director's notice. The MBEC may include in its recommendation to the Director of Finance other sanctions or penalties to be imposed on the de-certified business.

§ 4.5 *RE-CERTIFICATION*

At the end of two years, the certified firm shall submit a new certification application and any information requested by the MBEC to assist in determining whether such M/W-DBE is still a bona fide M/W-DBE in accordance with the criteria set forth in this Part 4. The certified firm shall remain eligible for participation as a M/W-DBE during the pendency of this review. In the event the application is denied in accordance with criteria set forth in this Part 4, the firm shall be notified of the reasons for the recommendation and shall be afforded an opportunity to file a grievance pursuant to Part 9 of these Regulations. A firm which fails to respond to re-certification review procedures will no longer be eligible for participation as a M/W-DBE and will be removed from the MBEC Directory of Certified Firms.

In conjunction with its re-certification review, the MBEC shall ascertain whether a business has received more than five million dollars of contract work with the City under Chapter 17-500, dating from July 1, 1985. In the event the business has achieved the program participation threshold, the MBEC shall evaluate the business' continuing eligibility to participate in the M/W-DBE program pursuant to § 4.3 of these Regulations.

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[23] PART 5. CITY AGENCIES: RESPONSIBILITIES

§ 5.1 *GOALS PROGRAM COORDINATOR*

Within ten days of the effective date of these regulations, the head of each agency shall forward to the MBEC the designation of a goals program coordinator who shall be responsible for developing, managing and implementing the goals program on a day-to-day basis.

§ 5.2 *SOLICITATION*

A. Each agency shall actively solicit minority and female owned disadvantaged business enterprises ("M/W-DBEs"), including those in the MBEC Directory of Certified Firms distributed by the MBEC, to participate both as prime contractors and subcontractors in City contracts awarded by the agency. The Procurement Department shall solicit M/W-DBEs including those in the MBEC Directory of Certified Firms, to participate, both as prime contractors and subcontractors, in all publicly bid contracts.

B. Each agency shall make the MBEC Directory of Certified Firms available to contractors, vendors and providers of professional services to assist with their efforts to meet contract requirements established pursuant to Chapter 17-500.

§ 5.3 *CONTRACTING ACTIVITIES*

A. On or before March 1 of each year, the MBEC shall work with each agency to develop a compliance plan that details how each such agency shall meet the goals requirements on the Eligible Aggregate Amount of all of its personal and professional

services contracts to be awarded by the agency in the ensuing fiscal year. Such compliance plan shall include significant opportunities for M/W-DBEs to participate in the performance of such contracts as both prime contractors and subcontractors.

[24] In developing such plan, the MBEC and the agency shall list, to the extent possible, all of the personal and professional services contracts to be awarded during such fiscal year and shall identify which contracts shall be awarded to M/W-DBEs as prime contractors and which contracts shall utilize M/W-DBEs as subcontractors. Each compliance plan shall demonstrate that a minimum of 15% of the Eligible Aggregate Amount of the agency's personal and professional services are targeted for award to disadvantaged minority owned businesses and a minimum of 10% are targeted for award to disadvantaged female owned businesses.

The MBEC shall approve each agency's compliance plan. In granting such approval, the MBEC shall consider such factors as:

(i) whether the contracts targeted for award to M/W-DBEs are sufficiently diverse in size and character so as to enhance the opportunity for meaningful economic development of such businesses, and

(ii) the extent to which the compliance plan reflects significant opportunities for M/W-DBEs to participate in the performance of such contracts as prime contractors.

The MBEC shall work with each agency to establish procedures designed to implement its compliance plan. Such procedures shall include:

(1) Using the MBEC Directory of Certified Firms to identify M/W-DBEs which are potential prime contractors and subcontractors;

(2) Coordinating and responding to inquiries and requests for advice from M/W-DBEs on contract matters;

(3) Reviewing proposed solicitations to ensure that M/W-DBEs will be afforded an equitable opportunity to participate;

(4) Making copies of solicitations available to the MBEC upon request;

(5) Any other such procedures that the MBEC deems necessary or desirable to implement the goals program and its compliance plan.

[25] B. The Procurement Department shall be required to meet the minimum goals with respect to the Eligible Aggregate Amount of its construction contracts and the Eligible Aggregate Amount of its vending contracts for materials, services, supplies and equipment to the extent that such contracts are not exempted in accordance with Part 7 of these regulations during each fiscal year in accordance with the procedures established pursuant to Part 11 of these Regulations. Such Eligible Aggregate Amount shall not include any amounts waived pursuant to § 6.5 hereof.

The Procurement Department shall establish procedures on publicly bid contracts that are designed to meet the minimum aggregate goals requirements for each category of vending and construction contracts, such procedures to include:

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(1) Incorporating the contract language described in Part 10 of these regulations in all appropriate contracts unless a contract is exempted as provided for herein;

(2) Coordinating and responding to inquiries and requests for advice from M/W-DBEs on contract matters;

(3) Working with each agency to review and design contract packages, including plans and specifications, to insure that such packages are structured in a manner that maximizes the opportunity for procurement from M/W-DBEs;

(4) Making copies of bid specifications and contract packages available to the MBEC upon request of the MBEC; and

(5) Any such other procedures that are necessary or desirable to implement the goals program.

[26] § 5.4 *RECORDS*

In order to monitor the progress of the goals program, each agency shall maintain a recordkeeping system that is developed in conjunction with the MBEC pursuant to Section 3.3 herein. Such recordkeeping system shall be maintained on a continual basis and shall be designed to reflect contract awards to M/W-DBEs, the progress made by prime contractors in achieving M/W-DBE subcontract goals and other contract participation efforts. In order to obtain the information sought by this Section it shall be the responsibility of each agency to routinely and systematically monitor each of its contracts included in the goals program. If the MBEC determines that an agency is not adequately monitoring its contracts, the agency, with the

assistance of the MBEC, shall review its recordkeeping system and make any modifications necessary for carrying out its responsibilities under this Section.

§ 5.5 *REPORTS*

A. In order to document the actual progress of the goals program, each agency shall submit monthly and annual reports commencing six (6) months after the effective date of the regulations to the MBEC which document the progress each agency has made in implementing its compliance plan. Such reports shall include:

(1) General — The original total dollar amount of each contract awarded by an agency according to the contract categories of vending, construction, and personal and professional services and the actual total dollar amount of each contract resulting from any contract amendments subsequent to award;

(2) Prime Contracts — The original total dollar amount of each contract awarded to a certified M/W-DBE as a prime contractor, the actual total dollar amount of each contract resulting from any contract amendment, the name [27] of each such certified business and the date of contract award, identifying whether such prime contractor is minority owned or female owned;

(3) Subcontracts — The original total dollar amount of each subcontract awarded by a prime contractor to a certified M/W-DBE, the actual total dollar amount of each subcontract resulting from any contract amendment, the name of each such certified business, the name of the prime contractor and the

date of the subcontract, identifying whether the subcontractor is minority or female owned;

(4) Joint Ventures

(a) The original total dollar amount of each contract or subcontract awarded to a joint venture containing a partner that is a certified M/W-DBE, the actual total dollar amount of each contract or subcontract resulting from any contract amendment, the name of each such certified joint partner, the name of the prime contractor, if applicable, and the date of contract award to the joint venture, identifying whether the certified joint partner is minority or female owned;

(b) For contracts or subcontracts awarded to a joint venture in which the certified M/W-DBE partner represents less than fifty-one (51%) percent of the interest of the joint venture, also provide the original total dollar amount of the contract or subcontract awarded to the joint venture multiplied by the percentage of the disadvantaged minority or female owned business's interest in the joint venture and the actual total dollar amount of such contract resulting from any contract amendment multiplied by the appropriate percentage; provided, however, that:

(i) The M/W-DBE derives substantial benefit from the arrangement;

(ii) The M/W-DBE is substantially involved in all [28] phases of the contract or sub-contract, including bidding, planning, staffing and daily management;

(iii) Such an arrangement is customary; and

(iv) Such arrangement is approved by the MBEC.

(5) Such other information that is requested by the MBEC.

B. Each agency's monthly report shall be submitted at such times designated by the MBEC.

C. Each agency's annual report shall be a compilation of the information contained in its monthly reports. The annual report shall be submitted to the MBEC within forty-five (45) days from the end of the fiscal year to which such report relates.

§ 5.6 *COMPLIANCE PLAN REVISIONS*

The MBEC shall review each agency's success in implementing its compliance plan. If the MBEC determines that an agency is not achieving the goals, or if an agency adds new contracts after its compliance plan for the current fiscal year has been reviewed and approved, the agency, with the assistance of the MBEC, shall revise its compliance plan for the purpose of ensuring the agency's compliance with the goals program.

§ 5.7 *COUNTING*

A. Each agency shall count contract amounts toward the goals program pursuant to the requirements of Chapter 17-500, Section 503.

B. The total dollar amount of a contract with a business owned and controlled by disadvantaged minority females is counted toward either the goal for disadvantaged minorities or

the goal for disadvantaged females, but not both. In the case of prime contract awards to disadvantaged minority female owned businesses, the agency may select the goal toward which the contract is counted. In the case of subcontracts with such businesses, the agency will be bound by the goal designated by the prime contractor.

[29] C. An agency may count toward its goals only expenditures to M/W-DBEs that perform a commercially acceptable function. A minority or female owned disadvantaged business enterprise is considered to perform a commercially acceptable function when it (1) engages in meaningful work that provides for performance of a distinct element of the contract (as required by the work to be performed in accordance with the bid specifications) where the distinct element is worthy of the dollar amount of the subcontract; and (2) carries out its responsibilities by actually performing, managing and supervising the work involved. The MBEC may evaluate the amount of work subcontracted, industry practices and any other relevant factors in determining whether the M/W-DBE is performing a commercially acceptable function.

(1) With respect to the provision of materials and supplies as a distinct element of a contract or subcontract, a M/W-DBE performs a commercially acceptable function if the business operations of such firm meet the definition of "manufacturer" or "regular dealer," as defined below.

(a) Manufacturer. A manufacturer is a firm that owns, operates, or maintains a factory or establishment that produces on the premises the materials or supplies purchased by the prime contractor.

(b) Regular Dealer. A regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials or supplies purchased by the prime contractor are bought, kept in stock, and sold to the public in the usual course of business. The criterion of selling to the public is important in distinguishing a regular dealer from a firm which performs supplier-like functions on an ad hoc basis or for only one or two contractors with whom it has a special relationship. A regular dealer, in other words, has a physical plant, an inventory, and a regular trade with a variety of customers. For example, such items as electrical and plumbing [30] supplies, lumber, brick, concrete and blacktop are customarily sold by regular dealers. A regular dealer in such bulk items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock, but must have as its principal business, and in its own name, the purchase and sale of these products. A regular dealer in bulk items must also be responsible for the distribution of such items.

[31] PART 6. CONTRACT GOALS' GOOD FAITH REQUIREMENTS

§ 6.1 *CONTRACT ELIGIBILITY*

A. Where a particular contract is subject to the requirements established pursuant to Chapter 17-500, the contractor's efforts to meet such goals shall be considered an element of responsiveness to the bid when the awarding agency considers award of the contract. The award of a publicly bid contract or the making of a contract for professional or personal services where the contractor intends to subcontract some portion of the work will be conditioned upon submission by the contractor to the contracting agency of an executed Schedule for Participation by M/W-DBEs or a Request for Waiver.

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Notwithstanding compliance with the requirements of Chapter 17-500, the awarding agency reserves the right to deny award of any contract in accordance with the Philadelphia Home Rule Chapter, § 8-200(2)(b).

B. A Schedule for Participation certifies that the contractor has met the M/W-DBE participation requirements. The Schedule for Participation will be accepted as a binding commitment and shall contain:

(1) The names and addresses of M/W-DBEs that will participate in the contract, identifying for each such business whether it is a disadvantaged minority or female owned business;

(2) A detailed description of the work that will be performed by each named M/W-DBE; and

(3) The dollar amount of participation reflected by the quotation provided to the contractor by each named M/W-DBE.

(4) The following shall apply in order to assure compliance with the provision of Philadelphia Code § 17-503(2)(b) that a subcontractor counted as a M/W-DBE is substantially involved in all phases of the subcontract:

> [32] (i) No prime contractor that seeks to meet the goals for M/W-DBE participation by entering into subcontracts with any M/W-DBE shall be considered to meet the goals: (1) if the M/W-DBE subcontractor does not perform a commercially acceptable function as specified in Section 5.7(C) herein; or (2) if any of the M/W-DBE subcontractors intend to subcontract more than ten percent (10%) of the dollar amount of

the services to be performed under its contract, unless the prime contractor discloses the information listed in part (ii) of this subsection and obtains prior written approval of its subcontractor's contracts. After such disclosure the MBEC shall determine whether M/W-DBE subcontractor(s) are substantially involved in all phases of the subcontract.

(ii) The prime contractor shall list on the Schedule for Participation (a) the name(s) and address(es) of the subcontractor(s) to be used by its M/W-DBE subcontractor(s), identifying for each whether it is a disadvantaged minority or female owned business, and (b) the dollar amount of the portion of the total subcontracted services to be performed by each separately listed subcontractor.

Provided that the requirements of this subsection do not apply to the subcontractor's contracts for the purchase of materials, equipment or supplies is an incident to the performance of services under its contract. As used in this subsection, "subcontractor" shall mean a subcontractor at any tier.

Schedules for Participation shall be forwarded the the MBEC upon receipt.

C. If a contractor does not comply with the goals requirements established pursuant to Chapter 17-500, such contractor shall submit a Request for Waiver, which shall contain:

(1) A statement that the contractor has exerted good faith efforts in accordance with the criteria set forth in § 6.2 herein,

but has been unable to make binding commitments sufficient to meet the requirements established for the contract, and therefore requests a waiver or reduction of the requirements upon showing by the contractor that the required good faith efforts have been [33] exerted; or a statement from a Qualified Contractor that it has filed an approved Voluntary Compliance Plan with the MBEC in accordance with Subsection G of this Section 6.1;

(2) The names and addresses of each M/W-DBE with which the contractor has made binding commitments, if any;

(3) Dollar amount of participation and description of work for each M/W-DBE with which contractor has made binding commitments, if any;

(4) A description of the reasons for which contractor was unable to make binding commitments with M/W-DBEs sufficient to meet or exceed the requirement; and

(5) Documentation demonstrating the contractor's good faith efforts in accordance with the criteria set forth in § 6.2 herein.

The Request(s) for Waiver shall be forwarded to the MBEC upon receipt.

D. In the event that at least one contractor to a publicly bid contract submits a Schedule for Participation that is satisfactory in form and content to the MBEC at a reasonable price, there shall be a *prima facie* presumption that contractors not submitting a Schedule for Participation that is satisfactory in form and content to the MBEC did not exert good faith

efforts to obtain the goals. Unless the presumption is rebutted, the lowest, responsible, responsive contractor who obtains the goals will be awarded the contract, and any Requests for Waivers shall be denied. If the presumption is rebutted, that contractor rebutting the presumption and granted a Request for Waiver who has the lowest price will be awarded the contract.

E. Where no contractor to a publicly bid contract submits a Schedule for participation at a reasonable price there shall be a *prima facie* presumption that all those contractors evidencing the achievement of goals less than the [34] contractor at a reasonable price with the highest goals did not exert good faith efforts to obtain the goals. Unless the presumption is rebutted, the lowest responsible, responsive contractor who is granted a Waiver and obtains the highest goals at a reasonable price will be awarded the contract and other Requests for Waivers shall be denied. If the presumption is rebutted, that contractor rebutting the presumption who has the lowest price will be awarded the contract.

F. In determing whether a *prima facie* presumption has been rebutted, the MBEC shall evaluate such contractor's good faith efforts in accordance with § 5.2 of these regulations. If the presumption is rebutted, the MBEC shall recommend to the Director of Finance that a Waiver shall be granted in accordance with § 6.3 of these regulations.

G. A Qualified Contractor may be granted a waiver from the goals requirements on a specific contract if it files with the MBEC a Voluntary Compliance Plan which is satisfactory in form and content to the MBEC. The entity submitting such Voluntary Compliance Plan shall cooperate fully with the MBEC and shall supply, upon request, any relevant information,

documents, or data relevant to the implementation of the Voluntary Compliance Plan. In the event that the MBEC determines that the Voluntary Compliance Plan is not being implemented or if the entity submitting the Voluntary Compliance Plan fails to cooperate with the MBEC by not complying with any reasonable request of the MBEC for information, documents or data relevant to the implementation of the Voluntary Compliance Plan, the MBEC may revoke its approval of the Voluntary Compliance Plan upon ten (10) days notice to the entity submitting such Plan. The City reserves the right to require a Qualified Contractor to meet the goals requirements on a specified contract whether or not the Qualified Contractor has an approved Voluntary Compliance Plan on file with the MBEC.

§5.2 *CRITERIA FOR DETERMINING CONTRACTORS' GOOD FAITH EFFORTS*

In the event that the MBEC acts on a Request for Waiver from a contractor in accordance with §6.1(D) and (E) above, the MBEC shall evaluate such contractor's good faith efforts to obtain the goals for the contract to which such Request for Waiver relates. Efforts that are merely *pro forma* are not good faith efforts necessary to establish grounds for a Waiver pursuant to §6.3. Efforts to obtain M/W-DBE participation are not good faith efforts if, given all relevant circumstances, they could not reasonably be expected to produce a level of M/W-DBE participation sufficient to meet the goals requirements. Actions which demonstrate a good faith effort on the part of the contractor shall be documented and include:

(1) The contractor's advertisements in general circulation media, trade association publications, and minority — focused media concerning subcontracting opportunities;

(2) Notice to M/W-DBEs soliciting their participation in the contract;

(3) The contractor's provision of adequate information about plans, specifications, and requirements of the contract to interested M/W-DBEs;

(4) The contractor's business assistance to interested M/W-DBEs; and

(5) The contractor's reasonable efforts to negotiate with M/W-DBEs for specific sub-bids, including the names, addresses, and telephone numbers of M/W-DBEs that were contacted.

§ 5.3 *WAIVER*

A Waiver shall only be granted to a contractor whose Request for Waiver is acted upon by the MBEC pursuant to § 6.1(D) and (E) herein. The MBEC shall make a recommendation to the Director of Finance as to whether the Request for Waiver demonstrates a good faith effort to comply with the goals requirements as prescribed in § 6.2 above. The Director of Finance shall render a decsion and [36] notify the contracting agency whether a Wavier has been granted and whether the bidder is eligible for award of the contract.

§ 5.4 *POST AND WAIVER*

A. If, after award of a contract, a contractor is unable to meet the goals requirement, the contractor must seek a substitute M/W-DBE to fulfill such requirement; provided, however, that such substitution is subject to the approval of the MBEC. If,

after reasonable good faith efforts, the contractor is unable to find a substitute, the contractor may submit a written Request for a Post-Award Waiver to the MBEC. The request shall document the reasons for the contractor's inability to meet the goals requirement.

B. Within five (5) days after receipt of the Request, the MBEC shall make recommendation as to whether a Request for Post-Award Waiver should be granted. Circumstances which may support a Post-Award Waiver may include a recommendation where the contractor is unable (1) to maintain a binding commitment for a particular M/W-DBE and (2) to make a binding commitment with a substitute classified M/W-DBE. The MBEC may consider such other circumstances that it deems appropriate when considering a Request for a Post-Award Waiver.

C. Within two (2) days of receipt of a recommendation, the Director of Finance shall render a decision. The Director of Finance shall notify the contracting agency whether a Post-Award Waiver has been granted.

§ 6.5 *EFFECT ON COUNTING*

C. If a Request for a Waiver is granted in accordance with Part 6 of these conditions, the dollar amont of the contract which is proportionate to the amount of the waiver may not be counted when calculating the total dollar amount of contracts awarded by an agency.

[37] § 7.1 *REQUEST FOR EXEMPTION*

A. An agency may make a written request to the MBEC

for an exemption from the goals program of a particular contract for a period of time equal to the length of the contract or for a class of contracts for a period of one year provided however, that all requests for exemptions on publicly bid contracts shall first be submitted to the Procurement Department, which shall review such request with the agency. If the Procurement Department and the agency agree that the proposed exemption request is warranted, then the Procurement Department shall submit the request to the MBEC for approval. A request shall be made to the MBEC at least sixty (60) calendar days prior to advertisement for bids unless some shorter period of time is approved by the MBEC, or as part of the MBEC's approval of the ageny's compliance plan as provided for in §7.2(A) herein. The MBEC shall promptly notify the appropriate agencies of its decision on the exemption request.

B. A request shall demonstrate that there is an insufficient number of M/W-DBEs to provide adequate competition and reasonable prices on bids or proposals.

§ 7.2 *EXEMPTIONS FOR PROFESSIONAL AND PERSONAL SERVICE CONTRACTS*

A. The compliance plan of an agency that is submitted pursuant to §5.3 herein shall specify which contract or class of contracts for professional or personal services the agency desires to exempt from the goals program. The MBEC shall consider such exemption(s) prior to making a recommendation regarding the approval of the agency's compliance plan. In the event that the MBEC determines that an exemption(s) should not be granted, the MBEC shall recommend that approval of such agency's compliance plan be withheld until the agency makes the [38] appropriate revisions to the plan provided, however,

that the agency shall not be relieved from meeting its goals during such period of time that it is seeking MBEC approval of its compliance plan. The recommendations of the MBEC shall be submitted to the Director of Finance, who shall review the recommendations of the MBEC and make a final decision.

B. In the event that an agency must award a particular contract for professional or personal services subsequent to the approval of the agency's compliance plan, and such contract was not identified or contemplated by the agency in its compliance plan and the agency is unable to satisfy the goals requirements on such contract, the agency shall seek an exemption for such contract before soliciting proposals.

§ 7.3 *AUTOMATIC EXEMPTIONS*

The MBEC shall from time to time establish automatic exemption amounts for publicly bid contracts in which the goals requirements are to be met through subcontracting. Such automatic exemptions shall not exceed $10,000.00 for vending contracts and $30,000.00 for construction contracts. The appropriate exemption amount shall be included in the appropriate bid packages.

§ 7.4 *GRANTING EXEMPTION*

Upon receipt of an exemption requests, the MBEC shall recommend to the Director of Finance whether an exemption shall be granted. The Director of Finance shall render a final decision promptly and notify the contracting agency of the exemption decision, the extent of the exemption and the time period for the exemption.

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§7.5 *EFFECT ON COUNTING*

If an individual contract or class of contracts has been made wholly or partially exempt from the goals program, the dollar amount of the contract which is proportionate to the extent of the exemption may not be counted when calculating the total dollar amount of contracts awarded by an agency.

[39] PART 8. POST AWARD COMPLIANCE REVIEWS

§ 8.1 *REVIEW*

A. The MBEC may make compliance reviews to ensure that contractors are in compliance with contract requirements established pursuant to Chapter 17-500. Compliance reviews shall begin with a review of material and information concerning the goals program submitted during the term of the contract.

B. When a contractor who has contracted with the City has received a payment or payments from the City for work performed, he/she must deliver, within five (5) business days, the proportionate share of the payment for the work performed to the subcontracting M/W-DBE specified in the contract. The MBEC shall require with each request for payment submitted by the contractor, a certification that timely payments of the contract proceeds have been made by the contractor to the M/W-DBE subcontractor. In the event that the contractor has not made such payments, he/she must provide an explanation satisfactory to the MBEC for the failure to make such payments. The certification forms provided to the contractor by the City pursuant to this subsection shall contain a notice informing the contractor that any false statements contained therein are made subject to the penalties provided in the Act of December 6,

1972, P.L. 1482, No. 334, § 1; 18 Pa. C.S.A. § 4904 (Purdon, 1987), concerning unsworn falsification to authorities.

C. The MBEC may conduct, when appropriate, an on-site review of the contractor's compliance with the goals program. Such review may include, but is not limited to, interviews, visits to the actual work site, and an inspection of any statistical or documentary materials relevant to the contractor's performance. However, the MBEC shall not interfere with the contractor's business or performance under the contract.

[40] D. The contractor shall fully cooperate with a compliance review in accordance with the goals requirements specified in the contract. Unreasonable failure or refusal to furnish information or to cooperate with the MBEC may result in the withholding of contract payments or be deemed a breach of contract resulting in the imposition of sanctions pursuant to § 3.7.

E. After review of a contractor's performance, the MBEC shall make one of the following recommendations:

(1) the contractor is in compliance; or

(2) there is reasonable cause to believe that the contractor is not in compliance.

§ 8.2 *STANDARDS FOR REASONABLE CAUSE*

The MBEC may believe that a contractor is not in compliance with contract requirements established pursuant to Chapter 17-500 for reasons which include:

(1) Documentation or information furnished by the contractor which does not adequately demonstrate that a M/W-DBE is performing the work actually contracted;

(2) Unreasonable failure or refusal by a contractor to furnish information requested by the MBEC;

(3) Discovery of information which is contrary to compliance information previously submitted by the contractor.

(4) The failure of the contractor to execute a written contract with the M/W-DBE subcontractor;

(5) Such other reasons that reasonably indicate that the contractor is not in compliance with Chapter 17-500.

§ 8.3 *DETERMINATION OF NONCOMPLIANCE*

A. Whenever the MBEC determines it has reasonable cause to believe that a contractor is not in compliance, it shall promptly cause written notice to be [41] sent by certified mail to the contractor. The notice shall state the reasons for the MBEC's belief that the contractor is not in compliance and require the contractor to show cause within five (5) days why it should not be found in breach of contract.

B. Based upon information supplied by the contractor, if any, the MBEC shall make a final recommendation as to whether the contractor is not in compliance with contract requirements established pursuant to Chapter 17-500. If a recommendation of noncompliance is rendered, the MBEC shall notify the Director of Finance and may make recommendations as to appropriate remedies. The Director of Finance shall make a final

determination, and take such steps as are appropriate under the circumstances.

[42] PART 9. GRIEVANCES

§ 9.1 *GRIEVANCES*

A. Any person or agency aggrieved by a finding, recommendation, proposal or other action implemented pursuant to Chapter 17-500 or these Regulations may file a grievance in writing, signed and dated, with the MBEC. The grievance shall be filed with the MBEC within ten (10) days of the date that the grievant is notified of the finding, recommendation, proposal or other action. The grievant shall state the grounds for the grievance and provide any information, including documentary evidence, necessary to evaluate the grievance. After evaluation of the grievance, the MBEC or the hearing officer shall either 1. make a recommendation based upon the written record or 2. schedule a hearing pursuant to § 9.2 of these Regulations if it is determined that a hearing will assist in a resolution of the grievance. The MBEC or the hearing officer may also recommend to the Director of Finance that he/she 1. deny the grievance for, among other things, lack of jurisdiction or lack of standing of a party or 2. extend the time for filing the grievance or waive the time for filing in the interest of justice. The MBEC shall specify in writing the reasons for its recommendations.

B. If the MBEC or hearing officer determines that a hearing is necessary, hearing data shall be scheduled within seven (7) days of the date the grievance is received by the MBEC. The hearing data may be continued if the persons or agencies named in the grievance agree to a continuance. A continuance will not be granted if it is contrary to the best interest of the City. The

MBEC or hearing officer shall notify in writing the person or agency filing the grievance of the date, time and place of the hearing.

[43] § 9.2 *HEARING*

A. At least five (5) days prior to a scheduled hearing, the MBEC shall issue and serve a written notice, together with a copy of the grievance as filed, to all persons or agencies named in the grievance. Such persons or agencies shall be required to appear at an informal hearing before the MBEC at the time and place specified in the notice. The MBEC may designate a panel of three or more of its members or a hearing officer to preside at such hearing, provided that the proposed recommendation of such panel or hearing officer shall be submitted to the MBEC for approval, modification or reversal in accordance with the procedures in these regulations for a valid finding, recommendation, proposal or other action by the MBEC.

B. The MBEC or the hearing officer may request testimony from any person or agency when it determines that such testimony may assist in the resolution of the Grievance.

C. All persons or agencies named in the grievance shall appear at such hearing in person. The MBEC or the hearing officer shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and shall be transcribed. Testimony shall be taken by the MBEC or the hearing officer informally, and the person filing the grievance and the persons and agencies named in the grievance shall be given an opportunity to cross-examine.

Appendix J

§ 9.3 *DECISIONS*

On or before twenty (20) calendar days after the date the grievance is filed, the MBEC shall render a written recommendation to the Director of Finance as to the validity of the grievance as well as any appropriate remedies. Said recommendation shall include the findings of fact and the reasons supporting the recommendation. After receipt of the recommendation of the MBEC, the Director [44] of Finance shall render a decision which shall be final.

§ 9.4 *APPEALS*

A. A recommendation of the MBEC may be appealed to the Director of Finance within five (5) days of the date of the recommendation. The appeal shall be in writing, signed and dated, and the party appealing the recommendation shall specify in detail the reasons for such appeal.

B. Within twenty (20) calendar days of the date of the appeal is filed, the Director of Finance shall review the recommendation of the MBEC and shall render a decision which shall be final. The Director of Finance may require such additional information as he/she deems appropriate to assist in making a decision.

§ 9.5 *EFFECT OF A PENDING DECISION*

Pending a decision by the MBEC or the Director of Finance, the Director of Finance may stay any action pertaining to the Grievance if such stay is determined to be in the best interest of the City.

Appendix J

[45] PART 10. REQUIRED CONTRACT LANGUAGE

§ 10.1 *CONTRACT LANGUAGE*

A. All contracts subject to requirements established pursuant to Chapter 17-500 shall include language approved by the City Solicitor providing for compliance with the requirements of Chapter 17-500 and these regulations and providing that co-operation with the MBEC on contract matters is material to the City contract. Such contract language shall further provide for remedies, including, but not limited to, termination of the contract in the event of noncompliance.

B. All contracts shall further provide that prime contractors will agree to the assignment by their M/W-DBE subcontractors, of the proceeds of such subcontracts to financial institutions providing working capital financing for the subcontract.

[46] PART 11. GOALS PLAN: SHELTERED MARKET AND SUBCONTRACTING OPPORTUNITIES

§ 11.1 *THE GOALS PLAN*

A. To achieve the goals set forth in Chapter 17-500 for contracts let by the Procurement Department during each fiscal year, an overall plan (hereinafter referred to as the "Goals Plan") shall be developed in accordance with the procedures set forth in this Part 11 to achieve the specified goals on the Eligible Aggregate Amount of vending contracts and the Eligible Aggregate Amount of construction contracts. Such goals requirements shall be achieved through the bidding of certain contracts pursuant to the Sheltered Market and through the bidding of certain contracts which require the prime contractor

to meet goals requirements by subcontracting portions of the services or work to be performed to M/W-DBEs. The portion of the Goals Plan which identifies how the minimum goals will be achieved on the Eligible Aggregate Amount of vending contracts shall be hereinafter referred to as the "Vending Plan", and the portion of the Goals Plans which identifies how the minimum goals will be achieved on the Eligible Aggregate Amount of construction contracts shall be hereinafter referred to as the "Construction Plan".

The Goals Plan shall be developed in accordance with the procedure hereinafter set forth. The MBEC shall establish an annual schedule for the preparation, submission and approval of the Goals Plan to ensure that such Plan is implemented on a timely basis.

B. Each agency, working in conjunction with the MBEC, shall prepare a construction proposal which shall identify which of the agency's construction contracts for the ensuing fiscal year shall be set aside for bidding pursuant to the Sheltered Market and which shall establish goals requirement for subcontracting to M/W-DBEs. Each agency shall submit its construction proposal [47] to the Procurement Department, which, with the assistance of the MBEC, shall incorporate all such proposals into the Construction Plan. The Procurement Department shall submit the Construction Plan to the MBEC for approval.

C. The Procurement Department, working in conjunction with the MBEC, shall prepare a Vending Plan which shall identify which of the vending contracts for materials, services, supplies and equipment shall be set aside for bidding pursuant to the Sheltered Market and which shall establish goals requirements for subcontracting to M/W-DBEs. In developing

such plan, Procurement and the MBEC shall seek the assistance of other agencies where necessary or appropriate in evaluating whether a particular contract or class of contracts shall be bid pursuant to the Sheltered Market or bid with subcontracting requirements. On or before March 1st, Procurement shall submit a preliminary Vending Plan for the ensuing fiscal year to the MBEC and the final Vending Plan shall be submitted to the MBEC for approval on a date designated by the MBEC.

D. During the first fiscal year or portion thereof, and for each succeeding fiscal year in which the Goals Plan cannot be developed in accordance with the procedures set forth in this subsection, the MBEC shall review with Procurement each contract prior to being let to establish whether such contract should be bid pursuant to the Sheltered Market or bid with the goals requirements being met through subcontracting, the goals percentages for each such contract with subcontracting requirements, or bid without any goals requirements.

E. In granting its approval of the Construction Plan and the Vending Plan, the MBEC shall consider such factors as:

1. whether the minimum goals requirements are proposed to be met for each of the Plans;

2. whether the contracts targeted for award to M/W-DBEs are sufficiently diverse in size and character so as to enhance the opportunity for meaningful economic development of such businesses: and

[48] 3. whether the Plans contemplate significant opportunities for M/W-DBEs to participate in City contracts as both prime and subcontractors.

The MBEC shall take action on such Plans promptly.

§ 11.2 *SHELTERED MARKET PROCEDURES*

1. Construction contracts and vending contracts shall be set aside for bidding pursuant to the Sheltered Market in accordance with the following guidelines:

(a) an estimate of the total number of the Eligible Aggregate Amount of all construction contracts and all vending contracts for materials, services, supplies and equipment to be awarded in the fiscal year to which the Goals Plan relates shall be prepared, identifying any contracts for which the Plan exemption shall be sought;

(b) the current list of certified M/W-DBEs shall be reviewed, and each of the proposed contracts (individually or by class of contracts) shall be identified for which there is available a sufficient number of certified M/W-DBEs to ensure that bidding on such contracts pursuant to the Sheltered Market will be competitive. A sufficient number of certified M/W-DBEs shall be established in accordance with Subsection (2) hereof;

(c) a number of contracts shall be selected from the eligible contracts identified pursuant to subsection (1)(b) whose aggregate value, together with the value of those contracts let on a subcontract basis, is a minimum of fifteen percent (15%) of the Eligible Aggregate Amount of all construction contracts and all vending contracts to be awarded in the fiscal year to which such Plans relate, to be set aside for bidding solely by disadvantaged minority owned businesses, and an additional number of such contracts whose aggregate value is a minimum of ten percent (10%) of the Eligible Aggregate Amount of all

construction contracts and all vending contracts to be [49] awarded in such fiscal year, to be set aside for bidding solely by disadvantaged female owned businesses;

(d) ensure to the greatest extent possible that the contracts selected for bidding pursuant to the Sheltered Market represent a cross-section of the classes of contracts let by the Procurement Department. Where the availability of certified M/W-DBEs is insufficient to achieve participation through the Sheltered Market in a cross-section of the classes of contracts let by the Procurement Department, contracts in the under-represented classes of contracts shall be identified which, by contract size of the nature of the work to be performed, are appropriate for subcontracting or joint-venture participation, and such contracts shall be bid in such a manner as to seek participation by M/W-DBEs through subcontracting or joint-venturing in accordance with the procedure prescribed in Part 6 of these regulations.

(e) In order to assist with the preparation of its future annual construction proposal, the MBEC shall work with each agency on an on-going basis as such agency develops its long term capital budget program. The agency and the MBEC shall evaluate proposed future construction projects to determine whether and the extent to which such projects are amenable to bidding pursuant to the Sheltered Market. The MBEC may recommend to the agency that particular future construction contracts be structured and designed in such a manner as to enhance the opportunity for such contracts to be set aside in whole or in part in the future for bidding pursuant to the Sheltered Market.

(f) In order to provide a guideline for the selection of construction contracts to be set aside for bidding pursuant to

the Sheltered Market, the MBEC, with the assistance of the Procurement Department, shall prepare an analysis of the total construction budget, which shall establish classes of such contracts by dollar range and identifies the total number and dollar amount of [50] construction contracts within each range. To the greatest extent possible, construction contracts shall be selected from each range for bidding pursuant to the Sheltered Market.

2. Procurement, working in conjunction with MBEC, shall select contracts for bidding pursuant to the Sheltered Market based upon the following facts and information:

1. Whether the number of certified M/W-DBEs capable of bidding on a proposed contract or class of contracts meets or exceeds the average number of bidders on such contracts or class of contracts previously let by the city for the last twelve months or when the last bid was received; for the fiscal year in which these regulations are adopted a contract may be sheltered provided that the number of certified M/W-DBEs meets or exceeds the average number of bidders that respond to such bids during the three month period prior to the sheltering of said contract;

2. Whether the number of certified M/W-DBEs capable of bidding on a proposed contract or class of contracts is sufficient to satisfy standards of competitiveness; and

3. Whether the work to be performed pursuant to a contract proposed to be sheltered is such that the

sheltering will encourage the development of M/W-DBEs in that type of business and potentially increase the number of M/W-DBEs capable of competing on the proposed contract or class of contracts.

3. Other written guidelines for selecting eligible contracts to be set aside for bidding pursuant to the Sheltered Market may be developed and established with the approval of the MBEC.

4. Contracts selected in accordance with this subsection shall be set aside for bidding only by certified M/W-DBEs.

5. At the discretion of the MBEC, contracts which are set aside for bidding pursuant to the Sheltered Market may exclude the goals requirements for subcontracting to M/W-DBEs. The bidding procedures for contracts set aside for [51] bidding by M/W-DBEs shall in all other respects be the same as for all other competitively bid contracts, and such contracts shall be awarded, if at all, to the lowest, responsive and responsible bidder.

6. The provisions of this Part shall not preclude any M/W-DBE from bidding on any other contract not specifically set aside for bidding pursuant to the Sheltered Market.

7. In the case of any contract set aside for bidding pursuant to the Sheltered Market, if no bids are submitted or the bids are otherwise rejected because it is deemed in the best interest of the City to do so, the contract may be removed from the Sheltered Market upon the resolicitation for bids.

8. Additional contracts shall from time to time be set aside for bidding only by disadvantaged minority owned businesses or female owned businesses as are be necessary to replace those contracts which were included in the Construction Plan or Vending Plan but were not let during the fiscal year or which were previously removed from the Sheltered Market pursuant to subsection (7) above to ensure that, in any fiscal year, the aggregate value of nonexempt construction or vending contracts which are awarded to M/W-DBEs will meet the minimum goals requirements.

§ 11.3 *REPORTING AND MONITORING*

The MBEC may require the Procurement Department to submit monthly reports to the MBEC to ensure that the minimum aggregate goals reflected in the Construction Plan and the Vending Plan are being met. In the event such reports reveal that such goals are not being met, the Procurement Department, working in conjunction with the MBEC, shall revise such Plans in order to achieve the minimum aggregate goals as required by this Part 11. Such revised Plan shall be submitted to the MBEC for approval.

No. 96-899

Supreme Court, U.S.
FILED
JAN 6 1997

In The

Supreme Court of the United States

October Term, 1996

CITY OF PHILADELPHIA; ELIZABETH REVEAL, AS DIRECTOR OF FINANCE FOR THE CITY OF PHILADELPHIA; CURTIS JONES, JR., AS DIRECTOR OF THE MINORITY BUSINESS ENTERPRISE COUNCIL FOR THE CITY OF PHILADELPHIA,

Petitioners,

vs.

CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, INC.; GENERAL BUILDING CONTRACTORS ASSOCIATION, INC.; ASSOCIATED MASTER PAINTERS & DECORATORS OF PHILADELPHIA, INC.; EMPLOYING BRICKLAYERS ASSOCIATION OF DELAWARE VALLEY, INC.; INTERIOR FINISH CONTRACTORS ASSOCIATION, INC.; MECHANICAL CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, INC.; ROOFING AND SHEET METAL CONTRACTORS ASSOCIATION, INC.; SUB-CONTRACTORS ASSOCIATION OF DELAWARE VALLEY, INC.; NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CITATIONS

Cases Cited:

City of Richmond v. J.A. Croson Company, 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989) 1, 4, 8, 9, 10, 12, 13

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The instant petition for a writ of certiorari seeks review of a decision of the United States Court of Appeals for the Third Circuit ("the court of appeals"). The court of appeals opinion is reported at 91 F.3d 586 (3d Cir. 1996).[1] Respondents request that the Court deny the petition for the reasons described below.

STATEMENT OF THE CASE

Respondents oppose the petition for writ of certiorari, which misrepresents the ruling of the court below and the relevance of this Court's opinion in *United States v. Salerno*, 481 U.S. 739 (1987). Contrary to the representations of petitioners, if *certiorari* were granted this Court undoubtedly would affirm the July 31, 1996, decision of the court below as a faithful (albeit somewhat relaxed) application of the principles of strict scrutiny review of local race-based set-aside programs announced by this Court in *City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (hereinafter referred to as *Croson*).[2]

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1. Citations to July 31, 1996 Opinion and Judgment of the United States Court of Appeals for the Third Circuit and January 11, 1995 Memorandum Order, Finding of Facts and Conclusions of Law of the United States District Court for the Eastern District of Pennsylvania will be to the opinions attached as Appendix B and C respectively to the Petition for a Writ of Certiorari.

2. If anything, certain of the court of appeals' rulings failed to adhere strictly enough to the dictates of *Croson*. Specifically:

1. the court of appeals permitted the City to introduce post-enactment statistical evidence to establish that the City had a compelling justification for its enactment of Chapter 17-500 in 1982;

2. the court of appeals refused to summarily reject the City's simplistic statistical analysis of prime contractor awards during fiscal

(Cont'd)

A. Course of Proceedings and Disposition of the Case Below.

On April 14, 1989, nine contractor associations (respondents herein, referred to as such or as "Contractors") brought suit in the United States District Court for the Eastern District of Pennsylvania against the City of Philadelphia and two city officials (petitioners herein, referred to as such or as "the City"), challenging the constitutionality of Chapter 17-500 of the Philadelphia Code ("Chapter 17-500" or "Ordinance"). Respondents alleged that Chapter 17-500's participation requirements for minority-, female-, and handicapped-owned businesses in City contracting violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Chapter 17-500 was enacted as an ordinance of the City of Philadelphia in 1982. Chapter 17-500 became effective on or about August 12, 1983 upon promulgation by the Minority Business Enterprise Council ("MBEC") of regulations governing

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(Cont'd)

years 1979 through 1982 as proof of a pattern or practice of discrimination by the City against black-owned prime contractors; and

3. the court of appeals refused to affirm the district court's invalidation of Chapter 17-500 on the basis of its finding that City Council's enactment of Chapter 17-500 was motivated by racial and gender politics, and not the remediation of any specifically identified discrimination in the Philadelphia construction industry.

In each case, however, the error of the court of appeals was harmless for as described *infra*, the court found an independent and unassailable basis for affirming the district court's conclusion that Chapter 17-500 violates the Fourteenth Amendment to the United States Constitution.

the award of all City contracts which are let by any City office, department, independent board, or independent commission for vending, including materials, equipment, services and supplies; public works; and personal and professional services ("Covered Contracts").

As originally enacted, Chapter 17-500 specified that at least 15 percent of the total dollar amount of each Covered Contract be paid to one or more minority-owned business enterprises ("MBE's") and that at least 10 percent of the total dollar amount of each Covered Contract be paid to one or more female-owned business enterprises ("WBE's"). In 1988, Chapter 17-500 was amended to specify that at least 2 percent of the total dollar amount of each Covered Contract be paid to one or more handicapped-owned business enterprises ("HBE's").

In earlier proceedings before the district court and the court of appeals, the participation requirements for WBE's and MBE's (other than black-owned businesses) imposed on the City's public works projects were invalidated because neither the evidence presented to City Council nor the "post-enactment" evidence developed by the City in this litigation provided any basis for concluding that qualified, willing and able WBE's and MBE's (other than black-owned businesses) were victims of systemic discrimination by the City or its prime contractors on such projects. Chapter 17-500's HBE participation requirement was upheld under the rational basis test.

In May and June of 1994, the district court conducted a nine-day bench trial on the constitutionality of Chapter 17-500's participation requirements for black-owned public works contractors.[3] On January 11, 1995, the district court struck down

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3. Section II of the July 31, 1996 Opinion and Judgment of the United States Court of Appeals For the Third Circuit recounts in detail the procedural steps of this case from the initial filing of the complaint to the 1994 trial.

that provision of the Ordinance, concluding that the requirement violated both prongs of strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment, as described by this Court's opinion in *Croson*. According to the district court, neither the evidence presented to City Council nor the post-enactment evidence offered at trial provided a "strong basis in evidence" that discrimination against black contractors was practiced by the City of Philadelphia or its prime contractors. The court also concluded that the record was devoid of proof that Chapter 17-500's fifteen percent goal for minority participation in City construction contracting is "narrowly tailored" to remedy identified prior discrimination in the Philadelphia construction industry. (Op. 122a, Appendix C).

Importantly, the district court specifically found that City Council was improperly motivated by racial politics when it enacted the Ordinance:

> The legislative history of Chapter 17-500 is replete with references which prove that **City Council's enactment of Chapter 17-500 was motivated by racial and gender politics**, and not the remediation of any specifically identified discrimination in the Philadelphia construction industry.

(Op. 115a, n. 24, Appendix C) (emphasis supplied).

On July 31, 1996, a panel of the court of appeals unanimously affirmed the district court's decision. Consistent with its earlier rulings, the court of appeals applied *Croson's* strict scrutiny review and concluded that Chapter 17-500's participation requirements for black-owned public works contractors violated the Equal Protection Clause. In describing the burden of proof that strict scrutiny review imposes upon a

party challenging a state or local government's race-based preference, the court noted that the party could succeed by showing **either** (1) that the subjective intent of the legislative body was not to remedy race discrimination in which the municipality played a role, or (2) that there is not a "strong basis in evidence" for the conclusions that race-based discrimination existed and that the remedy chosen was necessary. (Op. 21a, Appendix B).

Ironically, the court of appeals neither agreed nor disagreed with the district court's finding that the Ordinance was motivated by racial politics, commenting simply, "We do not reach this issue." (Op. 25a, n. 14, Appendix B). Having refused to disturb that finding, the court of appeals turned to the evidence offered by the City to demonstrate that City Council had a strong basis in evidence for concluding that race-based discrimination in public works contracting existed and that the remedy chosen was necessary. As noted by the court of appeals, the City advanced three distinct forms of racial discrimination to sustain the Ordinance's constitutionality: (i) statistical evidence of discrimination by prime contractors to the City in the award of subcontracts; (ii) racial discrimination by the respondent contractor associations in admitting members; and (iii) racial discrimination by the City in the award of its prime contracts. (Op. 26a, Appendix B).

The court of appeals agreed with the district court's finding that the City failed to offer any credible evidence of discrimination by the prime contractors to the City in the award of subcontracts, noting among other flaws that the City's own expert admitted that he "made no presentation to the Court as to participation by black minorities or blacks in subcontracting." (Op. 28a, Appendix B).

The court of appeals also agreed with the district court that

the City's unsubstantiated "evidence" of low MBE membership in the respondent contractor associations was not sufficient to justify the Ordinance's remedial purpose. Like the district court, the court of appeals found no evidence in the trial record to indicate that a single black-owned contractor was denied membership in any of the associations. (Op. 33a, Appendix B). The appellate court went on to note that the City awarded its prime contracts by sealed, competitive bidding without regard to membership in the respondent associations and that nothing in the record suggested that the City favored members of the associations in that bidding process. (Op. 34a, Appendix B).

Unlike the district court, however, the court of appeals refused to determine whether the City's statistical analysis of black-owned contractor participation as prime contractors on Philadelphia public works projects during fiscal years 1979 through 1982 was sufficient to justify City Council's avowed conclusion that qualified, willing and able black-owned contractors were being discriminatorily denied such contracts by the City itself. In light of the many serious flaws in the City's evidence, the court's comment that it is "a close call" whether that evidence demonstrates that the City engaged in racial discrimination against qualified, willing, and able black-owned contractors, (Op. 42a, Appendix B), is surprising to say the least. Nonetheless, for the purpose of the instant petition, it is sufficient to note that the court of appeals did not reach that issue because in its view, Chapter 17-500 clearly would not be narrowly tailored to eradicate and remedy any such prime contractor discrimination due to its almost exclusive focus on the subcontracting market and because the fifteen percent goal set forth in the Ordinance was far too excessive to address any possible race-based discrimination identified in Philadelphia prime contracting. (Op. 42a, Appendix B).

A subsequent petition filed by the City requesting rehearing by the Court of Appeals for the Third Circuit *en banc* was denied.

B. Correction of Misstatements in the Petition.

Pursuant to United States Supreme Court Rule 15, respondents point out the following misstatements of fact and law contained in the petition.

Petitioners assert that the district court and the court of appeals failed to adhere to Chief Justice Rehnquist's comment in *United States v. Salerno*, 481 U.S. 739 (1987), that a facial challenge to a legislative act will not be sustained unless the challenger establishes "that no set of circumstances exists under which the Act would be valid." 481 U.S. at 745 (the so-called "*Salerno* rule"). Petitioners assert that had the court of appeals followed the *Salerno* rule, it would have found "many circumstances where the Ordinance was constitutional." (Petition, p. 10). For this assertion, petitioners rely on the exemption and waiver provisions of the Ordinance. Petitioners' argument is confusing in that they seemingly contend that a local government can employ racial preferences without any evidentiary basis for concluding that remedial action is necessary so long as its program includes such "escape" mechanisms for use whenever the preference will be applied for the benefit of a contractor who was not a victim of discrimination.

Whether or not the *Salerno* rule accurately states the law with respect to facial challenges to race-based classifications under the Equal Protection Clause, that issue would be irrelevant to this Court's review of the July 31, 1996 decision of the court of appeals. Even if this Court were to disregard all of Chapter 17-500's constitutional flaws noted by the district court, the court of appeals' conclusion that the Ordinance is not a narrowly tailored remedy for the City's own discrimination against black-owned prime contractors because of the Ordinance's use of subcontractor participation requirements is unassailable. *A*

fortiori, under *Croson*, no set of circumstances exists in which Chapter 17-500 would be valid.

The City's claim that its tactics and proofs would have been different if it understood that the *Salerno* rule was no longer good law and would not be applicable to this case is a gross misstatement of fact. This case was tried by the district court and reviewed by the court of appeals according to the dictates of *Croson*. Respondents offered compelling proof that neither the evidence presented to City Council nor the post-enactment evidence offered by the City at trial provided a compelling justification for enactment of race-based remedial legislation. Similarly, respondents clearly and convincingly demonstrated that Chapter 17-500's fifteen percent goal for black-owned participation in City construction contracting is not narrowly tailored to remedy any identified discrimination in the Philadelphia construction industry. And finally, respondents proved and the district court specifically found that **"City Council's enactment of Chapter 17-500 was motivated by racial and gender politics."**

The City was well aware that under *Croson*, it would have to meet respondents' proofs in order to sustain the constitutionality of the Ordinance, whether or not the so-called "*Salerno* rule" applied. It is obvious from the opinions of the district court and the court of appeals that after six years of litigation, the City could not and did not meet those proofs.

Petitioners also assert that the district court held that the statistical study prepared by Dr. Brimmer was inadmissible as a matter of law, and that the court of appeals adopted the district court's holding thereby disregarding the holding of a prior decision of the court of appeals which was "the law of the case." (Petition, p. 17). This contention as well is a gross mischaracterization of the proceedings below.

Dr. Brimmer testified at the nine day trial before the district court in May and June of 1994 and his disparity study was admitted into evidence. (Op. 70a-75a, Appendix C). The district court rejected the conclusions of the Brimmer study. (Op. 75a-97a, Appendix C). In considering the holding of the district court with regard to the Brimmer study, the court of appeals noted:

> **We agree with the City that Contractors II established as the law of the case the admissibility of Dr. Brimmer's analysis.** Neither this nor our observations regarding the burden of persuasion, however, required the district court to accept that analysis and Dr. Brimmer's opinions uncritically. Like any other trier of fact called upon to evaluate expert testimony, it was entitled to accept of reject the facts and assumptions upon which the expert testimony was based and to evaluate the methodology that underlay it.

(Op. 24a, Appendix B) (emphasis supplied).

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS CORRECTLY EMPLOYED THE ANALYSIS SET FORTH BY *CROSON* TO INVALIDATE THE CITY OF PHILADELPHIA'S MINORITY SET-ASIDE ORDINANCE.

This case does not present the Court with an opportunity to review the validity of the *Salerno* rule. Instead, a grant of *certiorari* would present this Court with nothing more than an opportunity to affirm the lower courts' correct application of strict scrutiny review under *Croson*.

Justice O'Connor's description in *Croson* of the importance and purpose of strict scrutiny review is instructive:

> Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Croson, 488 U.S. at 204. Justice O'Connor's comment makes clear that a local government's race-based preference program is facially invalid if it permits the granting of preferences to black-owned contractors who were not victims of systemic discrimination by that local government or its prime contractors. This is true even though the program may in some cases actually benefit true victims of racial discrimination in public contracting because the lack of a tight "fit" or relationship tends to prove that the drafters of the program were less concerned with remedying identified discrimination than they were with gaining political favor.

As described earlier, the court of appeals concluded that even if discrimination in City contracting existed, Chapter 17-500 was not a narrowly tailored response to that discrimination because it focused almost exclusively on the subcontracting market and because the fifteen percent participation goal for black-owned contractors was clearly an excessive remedy for the race-based discrimination that the City allegedly practiced against black-owned prime contractors. This ruling echoed the district court's finding that the City was unable to provide a sufficient evidentiary basis from which to conclude that a fifteen

percent set-aside was necessary to remedy prior discrimination against black contractors in the market for City contracts.

Additionally, the record provided the court of appeals with other independent grounds for invalidating Chapter 17-500. The record shows that the subjective intent of the Philadelphia City Council in adopting the affirmative action program was not to remedy race discrimination by the City but rather to curry political favor. (Op. 45a-49a, Appendix B). The district court found the legislative history of Chapter 17-500 to be "replete" with references which prove that City Council's enactment of Chapter 17-500 "was motivated by racial and gender politics, and not the remediation of any specifically identified discrimination in the Philadelphia construction industry." [4] (Op. 115a, n. 24, Appendix C). Although the district court's finding of racial politics was neither accepted nor rejected by the court of appeals, the court of appeals did specifically rely on portions of Chapter 17-500's legislative record in holding that it could not say with assurance that Chapter 17-500 was anything more than "the product of unthinking stereotypes or a form of racial

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4. Chapter 17-500's legislative record showed that Philadelphia City Council never even attempted to determine the scope of the injury it allegedly sought to remedy with the Ordinance. (Op. 46a, Appendix B). The most telling portion of the legislative history in this regard includes a Councilperson's candid admission in the course of debate on an amendment to Chapter 17-500:

> We didn't do a study to see whether or not ten percent was proper for women or the percentage for minorities was correct. We knew that there were a lot of women out there and a lot of minorities out there and they weren't getting their share. And we set a goal. And it was pretty arbitrary. It was pretty arbitrary.

Id.

politics." (Op. 53a, Appendix B (quoting *Croson*, 488 U.S. at 510)). Respondents are confident that if this Court were to grant *certiorari*, it would agree with the district court's finding and affirm the invalidation of the Ordinance on that basis alone. *See, e.g., Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986).

Respondents are equally confident that if this Court were to grant *certiorari*, it would agree with the district court's rejection of the City's statistical analysis of black-owned prime contractor participation on Philadelphia public works projects during fiscal years 1979 through 1982 as a sufficient basis for City Council's avowed conclusion that qualified, willing and able black-owned contractors were being discriminatorily denied such contracts by the City itself. Although the district court correctly noted numerous substantial flaws in the City's evidence, this Court need look no further than the district court's finding that the City's statistics are not significant because only seven black contractors sought prequalification to bid on any of those contracts.[5] (Op. 96a, Appendix C).

In the concluding section of her opinion in *Croson*, Justice O'Connor provided the following specific guidance for legislatures and courts regarding a state or local government's use of race-based contracting set-asides as a remedy for prior discrimination against minority contractors:

> Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the City of Richmond had

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5. As noted by the district court, an interested contractor was required to apply for prequalification with respect to each City public works contract awarded during that time period.

> evidence *before it* that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of *qualified* minority contractors *willing* and *able* to perform a *particular service* and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion *could arise* . . . Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures *against those who discriminate* on the basis of race or other illegitimate criteria. . . . *In the extreme case*, some form of narrowly tailored racial preference *might be necessary* to break down patterns of deliberate exclusion.

488 U.S. at 509 (emphasis supplied). The district court and the court of appeals correctly applied these principles[6] in declaring that Chapter 17-500 is not narrowly tailored to serve a compelling state interest.

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6. *See* footnote 2 *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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